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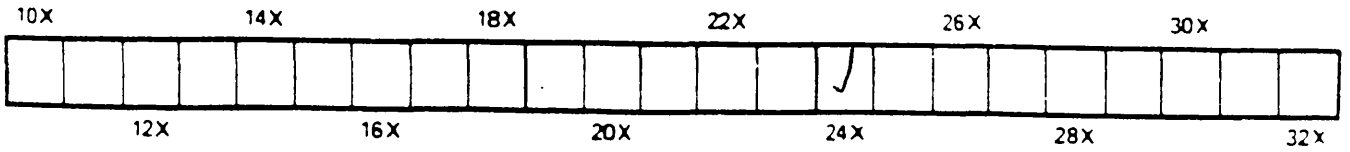

CRIMINAL CODE

THE CRIMINAL CODE OF CANADA

AND THE

CANADA EVIDENCE ACT, 1893

WITH

AN EXTRA APPENDIX

CONTAINING

THE EXTRADITION ACT, THE EXTRADITION CONVENTION WITH THE UNITED STATES, THE FUGITIVE OFFENDERS' ACT, AND THE HOUSE OF COMMONS DEBATES ON THE CODE.

AND

AN ANALYTICAL INDEX

BY

JAMES CRANKSHAW, B. C. L., Barrister, Montreal.

MONTREAL
WHITEFORD & THEORET, LAW PUBLISHERS

1894

TO THE RIGHT HONORABLE

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

Prime Minister and Minister of Justice

OF THE

DOMINION OF CANADA

THIS WORK

IS

MOST RESPECTFULLY DEDICATED.

PREFACE

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

J. C.

Montreal 18 Nov. 1893.

THE CRIMINAL CODE, 1892.

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

Amended in 1893 *by* 56 *Vict.*, *c.* 32.

ARRANGEMENT OF TITLES, ETC.

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LIST OF ABBREVIATIONS.

Abb. (N. Y.) App.....Abbott, New York Court of Appeals.
Abr. Ca. Eq.....Abridgment of Equity Cases.
Ad. & E (*or* A. & E).....Adolphus & Ellis' Report.
Ala.....Alabama.
Alb. L. J.....Albany Law Journal.
All. N. B.....Allen's New Brunswick Reports
Allen (*Mass*).....Allen, Massachusetts.
Am. Rep.....American Reports.
Am. Jur.....American Jurist.
Ann. Reg.....Annual Register.
Anon.....Anonymous.
Arch. Cr. Pl. & Ev.....Archbold's Pleading & Evidence in Criminal Cases.

B. & Ald.....Barnewall & Alderson.
B. & Ad.....Barnewall & Adolphus.
B. & B. (*or* Brod. & B).....Broderip & Bingham.
B. & C (*or* B. & Cr.).....Barnewall & Cresswell.
Bac. Abr.....Bacon's Abridgment.
Barn.....Barnardiston.
Bell C. C.....Bell's Crown Cases.
B. & S.....Best & Smith.
B. & P.....Bosanquet & Puller.
Bing.....Bingham.
Bish. New Cr. L. Com.....Bishop's New Criminal Law Commentaries.
Bish. Cr. Proc.....Bishop's Criminal Procedure.
Bl. Com.....Blackstone's Commentaries.
Bos. & P., N. R.....Bosanquet & Puller, New Reports.
Broom's Leg. Max.....Broom's Legal Maxims.
Broom's Com.....Broom's Common Law Commentaries.
Bro. P. C.....Brown's Parliament Cases.
Bull, N. P.....Buller's Nisi Prius.
Bur. Dig.....Burbridge's Digest Criminal Law.
Burr.....Burrow.

Cald.....Caldecott's Cases.
Cal.....California.
Camp.....Campbell's Reports.
Can. L. J.....Canada Law Journal.
Can. L. T.....Canadian Law Times.
Can. S. C.....Canada Supreme Court Reports.
Carr.....Carrington's Criminal Law.
C. & K.....Carrington & Kirwan.
C. & M. (or Car. & M.).....Carrington & Marshman.
C. & P.....Carrington & Payne.
Ch. App.....Chancery Appeals (Law Reports).
Ch. D.....Chancery Division.
Chit.....Chitty's Criminal Law.
Chit. Rep.....Chitty's Reports.

Clarke Cr. L .....Clarke's Criminal Law.
Clarke Magis. Man.....Clarke's Magistrates' Manual.
Cl. & F.....Clark & Finnelly.
Co. Litt.....Coke upon Littleton.
Co.....Coke's Reports.
Comb.....Comberbach.
C. B.....Common Bench Reports.
C. B. N. S.....Common Bench Reports (New Series).
C. P.....Common Pleas (Law Reports).
C. P. D.....Common Pleas Division.
Com. Dig.....Comyn's Digest.
C. S. C.....Consolidated Statutes of Canada.
C. S. L. C.....Consolidated Statutes of Lower Canada.
C. S. U. C.....Consolidated Statutes of Upper Canada.
Cranch.....Cranch's United States Supreme Court Reports.
Cr. L. Mag.....Criminal Law Magazine.
Cro.....Croke's Cases.
Cromp. & M.....Crompton & Meeson's Reports.
C. M. & R.....Crompton, Meeson & Roscoe's Reports.
C. C. R.....Crown Cases Reserved.
Cow. (N. Y.).....Cowen. New York.
Cowp.....Cowper's Reports.
Cox C. C.....Cox's Criminal Cases.
Cush. (*Mass.*).....Cushing, Massachusetts.

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

East.....East's Reports.
East P. C.....East's Pleas of the Crown.
E. & B.....Ellis & Blackburn's Reports.
E. B. & E.....Ellis, Blackburn & Ellis' Reports.
E. & E.....Ellis & Ellis' Reports.
Eng. L. & Eq.....English Law & Equity.
Esp.....Espinasse.
Exch. (*or* Ex.).....Exchequer (Law Reports).
Exch. D. (*or* Ex. D.).....Exchequer Division.

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

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

Hale, P. C.....Hale's Pleas of the Crown.
Han.....Hannay's New Brunswick Reports.
Hawk. P. C.....Hawkins' Pleas of the Crown.
Hist. Cr. L.....History of the Criminal Law, (Stephens)
H. L. C.....House of Lords Cases.
How. St. Tr.....Howell's State Trials.
H. & N.....Hurlstone & Norman.

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

Jur.....The Jurist.
Jur. N. S.....The Jurist, New Series.
J. P.....Justice of the Peace.

Keb.....Keble's Reports.
Kel.....Kelyng.

L. J. (Adm.).....Law Journal (Admiralty).
L. J. (Ch.).....Law Journal (Chancery).
L. J. (C. P.).....Law Journal (Common Pleas).
L. J. (Exch.).....Law Journal (Exchequer).
L. J. (M. C.).....Law Journal (Magistrates' Cases).
L. J. (P. C.).....Law Journal (Privy Council).
L. J. (Prob.).....Law Journal (Probate Court).
L. J. (Q. B.).....Law Journal (Queens Bench).

L. R., Adm.....Law Reports (Admiralty).
L. R., App. Ca.....Law Reports (Appeal Cases).
L. R., Ch.....Law Reports (Chancery).
L. R., C. P.....Law Reports (Common Pleas).
L. R., C. C. R.....Law Reports (Crown Cases Reserved).
L. R., Eq.....Law Reports (Equity).
L. R., Exch.....Law Reports (Exchequer).
L. R., H. L.....Law Reports (House of Lords).
L. R., P. C.....Law Reports (Privy Council).
L. R., P. & D.....Law Reports (Probate & Divorce).
L. R., Prob.....Law Reports (Probate).
L. R., Q. B.....Law Reports (Queen's Bench).

L. T.....Law Times.
L. T., N. S.....Law Times New Series.
L. N.....Legal News (Montreal).
L. & C.....Leigh & Cave's Crown Cases.
Lev.....Levinz.
Lew.....Lewins Crown Cases.
Ld. Raym.....Lord Raymond.
L. C. J.....Lower Canada Jurist.
L. C. L. J.....Lower Canada Law Journal.
L. C. R.....Lower Canada Reports.

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

Mer.....Merivale.
Metc. (*Mass.*).....Metcalf's Reports, Massachusetts.
Mich.....Michigan.

Mod.....Modern Reports.
Mon. L. Dig.....Monthly Law Digest. (Montreal.)
M. L. R.....Montreal Law Reports (Queen's Bench).
M. & M.....Moody & Malkin.
Moo (*or* Mood. C. C).....Moody's Crown Cases.
Moo. & R. (*or* M. & Rob.).....Moody & Robinson.
M. & P.....Moore & Payne.
M. & S. (*or* Moo. & S).....Moore & Scott.

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

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

Paley Sum. Con.....Paley on Summary Convictions.
P. E. I. Rep.....Prince Edward Island Reports.
P. Wms.....Peere Williams.
Pa.....Pennsylvania.
P. & D. (*or* P. & Dav.).....Perry & Davison.
Plow. (*or* Plowd.).....Plowden.
P. & B.....Pugsley & Burbridge's Reports, New Brunswick
Pugs.....Pugsley's Reports, New Brunswick.

Q. B.....Queen's Bench Reports.
Q. B. D.....Queen's Bench Division.
Q. L. R.....Quebec Law Reports.
Que. Off. Rep., (Q. B.).....Quebec Official Reports (Queen's Bench).

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

Salk.....Salkeld's Reports.
Show.....Shower.
Sid.....Siderfin.
Sir T. Raym.....Sir T. Raymond's Reports.
Sm. L. C.....Smith's Leading Cases.
Stark, Ev.....Starkie on Evidence.
Stark.....Starkie's Reports.
Steph. Comm.....Stephen's Commentaries.
Steph. Dig. C. L.....Stephen's Digest of Criminal Law.
Steph. Dig. Cr. Pro.....Stephen's Digest of Criminal Procedure.
Steph. Gen. View C. L.....Stephen's General View of Criminal Law.

Steph. Hist. C. L.....Stephen's History of the Criminal Law.
Str.....Strange's Reports
Stev. Dig.....Steven's Digest of New Brunswick Reports.
St. Tr.....State Trials.

T. R.....Term Reports.
Tayl. Ev.....Taylor on Evidence.
Taunt.....Taunton's Reports.
Tex.....Texas.
Tyrw (*or* Tyr).....Tyrwhitt.

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

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

W. Bl.....William Blackstone's Reports.
Wall. Jr.....Wallace Junior's United States Circuit Court.
W. N.....Weekly Notes.
W. R.....Weekly Reporter.
Whart. C. L.....Wharton's Criminal Law.
Whart. & S. Med. Jur.....Wharton & Stile's Medical Jurisprudence.
Wheat.....Wheaton's Reports.
Wis.....Wisconsin.
Wms. Saun.....William's Saunders Reports.
Wood. & T. For. M.....Woodman & Tidy's Forensic Medecine.

CORRECTIONS.

Page	3, Line 41.	Strike out the word "*such*."
"	13, Line 39.	Read "*Compulsion*" instead of "*Complusion.*"
"	14, Note (8).	Read "*Broom's* Leg. Max." instead "*Brown's* Leg. Max."
"	14. Note (9).	Read "Dears C. C. R." instead of "1 Dears C. C. R."
"	19, Note (2).	Read "pp. 41-42" instead of "p. 140."
"	21, Line 45.	Read "*Numbers*," instead of "*Number*."
"	33, Line 14.	Read "*with*," instead of "*will*".
"	34, Note (3).	Read "2 F. & F." instead "2 F. & J.".
"	38, Line 17.	Read "he" instead of "be."
"	40, Line 11.	Read "intended" instead of "*intented.*"
"	40, Line 17.	Read "*frustrated*" instead of "*frustated.*"
"	40, Line 27.	Read "advises," instead of "*advices*."
"	45, Line 30.	Read "*go*" instead of "*ge*".
"	58, Line 31.	Read "*makes*" instead of "*make.*"
"	75, Line 24.	Read "Majesty's" instead of "*Majesty.*"
"	93, Line 27.	Read "Gotley" instead of "*Gatley.*"
"	93, Line 28.	Read "*C. & P.*" instead of "C. D. P."
"	105, Note (3).	Read "54 L. J. (M.C) 14," instead of "L. J. (M.C.) 14."
"	107, Note (6).	Read "31 N. W. Rep. 585," instead of "31 N. W. Rep."
"	119, Line 52.	Read "Marshall," instead of "*Morshall.*"
"	120, Line 14.	Read "delaying," instead of for "delaiyng."
"	124, Line 14.	Read "art," instead of "ar".
"	127, Note (2).	Read "E. & B" instead of "8 R. & B."
"	165, Line 23.	Read "233" instead of "223."
"	173, Heading of.	Read "BODILY" instead of "BOLIDY."
"	175, Numbering of.	Read "175" instead of "715."
"	182, Note (1).	Read "Dears & B." instead of "1 Dears & B."
"	185, Note (4).	Read "Audley, 1 St.Tr.393," instead of "*Andley*, St.Tr.393"
"	187, Line 20.	Read "will" instead of "*will.*"
"	187, Note (1).	Read "1 C. C. R." instead of "1 C. C."
"	193, Line 54.	Read "Stillettos" instead of "*Stillettes.*"
"	198, Note (7).	Read "1 Q. B. D." instead of "Q. B. D."
"	199, Note (7).	Read "Horn" instead of "Hern."
"	202, Note (3).	Read "Mar." instead of "Mor."
"	219, Line 31.	Read "girl" instead of "*glrf.*"
"	223, Note (1).	Read "Mathews" instead of "*Mathers.*"
"	224, Note (2).	Read "33" instead of "32."
"	224, Note (2).	Read "N. S." instead of "N. B."
"	224, Note (3).	Read "1 Moo." instead of "2 Moo."

Page 224, Note (4). Read "Ir." instead of "Jr."
" 226, Line 29. Read "Commits" instead of "*commts.*"
" 234, Note (2). Read "Gathercole" instead of "*Gutherole.*"
" 237, Note (1). Read "L. R., 4 P. C. 495," instead of "L. R. P. C. 495."
" 245, Note (6). Read "1 Str. 498," instead of "*Str.* 498."
" 274, Note (6). Read "C. & P." instead of "C. P."
" 276, Note (2). Read "12 Q. B. D. 25," instead of "12 Q. B. D. 38."
" 280, Note (6). Read "12 Q. B. D. 25," instead of "12 Q. B. D."
" 294, Note (1). Read "R.v. King, R. & R. 332," instead of "R.v. King, 332."
" 298, Line 32. Read "*animo*" instead of "*animos.*"
" 315, Line 16. Insert "shew" between "*theft*" and "*that.*"
" 315, Note (4). Read "1 C C. R 150," instead of "1 C. C. 150."
" 316, Note (3). Read "2 C. C R. 134," instead of "2 C. C. 134."
" 334, Line 28. Read "marines," instead of "*mariners.*"
" 336, Note (5). Read "Eccles" instead of "*Eceles.*"
" 337, Note (4). Read "Dav. & M." instead of Dan. & M."
" 337, Note (8). Read "1 A. & E. 706," instead of "1 A. & E. 70."
338, Note (1). Read "Cl. & F." instead of "Cl. & J."
" 343, Note (6). Read "Hall" instead of "Hale."
" 367, Note (4). Read "P. C." instead of "C. P."
" 377, Line 1. Read "into" instead of "in."
" 391, Note (1). Read "1 Mood.", instead of "Mood."
" 402, Note (7). Read "1 Den. 35," instead of "Den. 35."
" 403, Note (2). Read "Joyce" instead of "Jovce."
" 403, Note (4). Read "Rob.", instead of "Rol."
" 405, Note (1). Read "21 L. J.," instead of "23 L. J."
" 410, Line 23. Read "Counterfeit" instead of "*conterfeit.*"
" 428, Note (5). Read "Bannen" instead of "*Bannon.*"
" 509, Line 19. Read "possessed" instead of "possesssd."
" 509, Note (2). Read "Bullock" instead of "Bulloek."
" 516, Note (6). Read "14 L. N." instead of "L. N."
" 526, Line 11. Read "foreign" instead of "foreing."
" 527, Line 32. Read "time," instead of "tiem."
" 555, Line 20. Read "for," instead of "or."
" 586, Line 1. Read "634," instead of "614."
" 586, Line 2. Read "613," instead of "614."
" 597, Line 27. Read "waived," instead of "*named.*"
" 617, Line 12. Read "usual," instead of "usal."
" 638, Note (1). Read "18 L. T.," instead of "L. T."
" 642, Note (1). Read "Greenough," instead of "*Grenough.*"
" 647, Line 31. Read "proceeding," instead of "*preceding.*"
" 655, Note (1). Read "6 Cox, 194," instead of "6 Cox."
" 658, Line 9. Read "where," instead of "were."
" 683, Line 24. Read "North," instead of "Nerth."
" 688, Note (1). Read "28 L. J. (M. C.)," instead of "29 L. J. (M. C.),
" 717, Line 24. Read "Conditions," instead of "*certificate.*"
" 809, Line 45. Read "gentlemen," instead of "*gentemen.*"

INTRODUCTION.

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

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

"The question whether the reduction of the criminal law of England, written and unwritten, into one code is either desirable or practicable is one which has been much considered. In 1833, 1836, and 1837, three different commissions were issued, under which eight Reports were made. In 1845, a fourth commission was issued, under which five Reports were made. In the fourth report of the Commissioners of 1845 is a draft of a Bill for consolidating, into one statute, the written and unwritten law relating to the definitions of crimes and punishments. This Bill was introduced into the House of Lords, in 1848, by Lord Brougham, but was not further proceeded with.

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

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

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

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

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

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

"We have also considered, with care, Lord St. Leonards' Bill as amended by the Select Committee, and the criticisms of the judges as found in the Sessional Papers of 1854. These criticisms (many of

which were unsubstantial and needlessly refined) may be taken to shew that to frame a code properly is a very *difficult* task; but we do not think they, by any means, justify the conclusion that the undertaking is *impracticable*.

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

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

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

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

"In the first place, it must be observed that codification merely means the reduction of the existing law to an orderly written system freed from the needless technicalities, obscurities, and other defects which the experience of its administration has disclosed. The process must be gradual. Not only must particular branches of the law be dealt with separately, but each separate measure intended to codify any particular branch must of necessity be more or less incomplete. No one great department of law is absolutely unconnected

with any other. For instance, bigamy is a crime, but, in order to know whether a person has committed bigamy, it is necessary to know whether his first marriage was valid. Thus, the definition of the crime of bigamy cannot be completely understood by any one who is unacquainted with the law relating to marriage. The definition of theft, again, involves a knowledge of the law relating to property, and this connects itself with the law of contract and many other subjects.

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

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

"The unwritten portion of the criminal law includes the three following parts: 1., principles relating to matter of excuse and justification for acts which are *primâ facie* criminal; 2., the definitions of murder, manslaughter, assault, theft, forgery, perjury, libel, unlawful assembly, riot, and some other offences of less frequent occurence and importance; and, 3., certain parts of the law relating to procedure. To do for these parts of the criminal law what has already been done for the rest of it is, no doubt, a matter requiring labour and care; but when so much of the work has been already done, it seems unreasonable to doubt either that the remaining part of the criminal law can be reduced to writing, or that, when it is written down and

made to form one body with the parts already written, the whole will not be improved.

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

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

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

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

"The truth is that the expression, '*elasticity*,' is altogether misused when it is applied to English law. The great characteristic of the law of this country, at all events of its criminal law, is, that it is extremely detailed and explicit, and leaves hardly any discretion to the judges. This may be shown by comparing it with the law of France. The criminal law of France is founded upon the *Code Penal*, but the decisions of the courts as to the meaning of the code, do not form binding precedents; and the result is that the French Courts can, (within the limits prescribed by the words of the *Code Pénal*), decide according to their own views of justice and expediency. In the exercise of this discretion, they are, of course, guided, though they are not bound, by previous decisions. The result is that French criminal law, under the *Code Pénal*, is infinitely more elastic than the Criminal Law of England is or ever has been, although the latter is founded on unwritten definitions and principles. For instance, it is stated in a work of great authority, (Chauveau et Hélie, "*Théorie du Code Pénal*," III, 487-9, Edn. 1861), that, after holding for 27 years, that to kill a man in a duel did not fall within the definition of "*Assassinat*," given in the *Code Pénal*, the Court of Cassation decided, in 1837, that such an act did fall within it. The authors of the work in question argue, at great length, that the earlier decisions were right, and ought to be followed. A comparison of the provisions contained in Part III of our Draft Code, (1) with the provisions, on the same and similar subjects, in the *Code Pénal*, and the German STRAFGESETZBUCH (2) will show how numerous and important are the questions which these codes leave to be decided, as they arise, by judges and juries. We may observe, that it is this generality of language, leaving so much to be supplied by judicial discretion, which gives to the foreign Codes that appearance of completeness

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

(2) German Penal Statutes.

which creates so much misconception as to what can or ought to be effected by a code for this country.

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

"We do not, however, mean to assert that this particularity is always necessary. Wherever precise and definite propositions are to be conveyed, our rules for the construction of statutes, in many cases, prohibit the employment of general language, and require elaboration and detail in the structure of a Code; but where the principles of our law admit of any matter being left to the so called discretion of the judge or jury, as the case may be, this discretion can be preserved in a code by the use of general language. An illustration is supplied by the Extradition Act, (33 and 34 Vict. c. 52, s. 3), which enacts, amongst other things, that, a fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character. It is obvious that the employment of the expression, '*an offence of a political character*,' might, under circumstances easy to imagine, impose upon the tribunal the necessity of deciding questions of extreme delicacy and difficulty, towards the decision of which the mere words of the Legislature would contribute little or nothing. Another illustration may be found in section 39 of 33 and 34 Vict. c. 9, where a crime is referred to as '*of the character known as agrarian.*' Numerous instances occur in the Draft Code in which we have thus, designedly and of necessity, employed general language. In the part on 'Matters of excuse and justification,' such expressions as the following frequently occur: '*Force reasonably necessary for preventing the continuance or renewal of a breach of the peace*'; and '*Force not disproportioned to the danger to be apprehended from the continuance of the riot.*' In the provision relating to provocation, we speak of '*an insult of such a nature as to deprive an ordinary person of the power of self-control;*' and many other expressions of the like kind occur in different parts of the Draft Code. All of them leave, and are intended to leave, a considerable latitude to the jury in applying the provisions of the Draft Code to particular states of fact. In other cases, a considerable amount of discretion is given to the court. Thus, for instance, it is declared to be a question of law whether a particular order given for the suppression of a riot is '*manifestly*

unlawful'; whether the occasion of the sale, publishing, or exhibition of certain classes of books, engravings, &c. is such '*as might be for the public good*,' and whether there is evidence for the jury of '*excess*.' Again, all the provisions relating to libel are so drawn that wide latitude would be left to the jury in determining whether a given publication is or is not libellous.

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

Although, as above stated, the opinions of the Judges on the Bills sent to them by Lord Cranworth were unfavorable, it would seem, from the following extracts from some of their letters, that the main objection of the Judges was not directed so much against the principle of codification itself as against any such system of codification as might involve the repeal of the rules of the common law.

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

BARON PARKE said: "I feel bound to state that in my opinion the proposed measure, which is to abrogate the common law with respect to criminal offences, and put an end to all its rules and definitions of offences, is a measure likely to produce no benefit in the administration of criminal justice, but decidedly the reverse. My objection to the proposed measure by no means rests upon any want of care and skill in the Commissioners, in the preparation of the proposed statutory codes, but is founded on the danger of confining provisions against crimes to these enactments, and repealing in this respect the rules of the common law, which are clear and well understood, and have the incalculable advantage of being capable of application to new combinations of circumstances perpetually occurring, which are decided when they arise, by inference and analogy to them, and upon the principles on which they rest. Whatever

care be used in defining offences, and in the language of the proposed enactments, it will be impracticable to make the definitions embrace every possible case that can arise, and consequently many acts which are criminal, and closely fall within the principle of the rules of the common law, will be dispunishable, *whereas, if the common law is suffered to continue*, it may justly and legally be applied to them."

Baron Alderson: "Let the Bill be confined to consolidating and amending, if necessary, the statute law as to these crimes, and adding new provisions where doubts have arisen from inconvenient constructions by the Courts, either of the words of antecedent statutes, or of the rules of the common law in particular cases; but let us retain the rules and principles of the common law as they have been handed to us from our predecessors."

Mr Justice Coleridge: "I cannot but express an earnest hope that our common law, that is, the principle of an unwritten traditionary law, may not be taken from us. Like many other things in our constitution, it may seem objectionable in theory, but in its results is found to produce the greatest good."

Mr. Justice Wightman: "Our existing criminal law being partly written and partly unwritten, the former parts being contained in a great many statutes, and the unwritten part to be collected from a mass of authorities to be found in the reports and the works of text writers upon the subject, is scarcely, if at all, accessible to the bulk of Her Majesty's subjects, nor indeed to any except such as are lawyers by profession; and there can, I apprehend, be no doubt but that if a statute or statutes or code could be framed with such accurate and clear definitions and provisions as would with certainty and precision include all offences known to the criminal law, and as certainly exclude all other cases, it would be one of the greatest of public benefits. The law would be at once accessible and certain. With respect to so much of the criminal law as is founded upon statutes, I am not aware of any well-founded objection that could be made to the reduction of it into a single statute or partial code, or of any difficulty in the framing of such a statute. The case, however, is very different with respect to that part of the criminal law which depends upon the common law. In applying the rules and principles of the common law to any particular case, the Court is not fettered nor embarrassed by being obliged to put a construction upon particular words or expressions, but it is sufficient if the case falls within any rule or principle to be deduced from the authorities. If, however, the whole of the criminal law were reduced into one or more statutes,

that part of it which now depends upon the common law would become statute law, and, like other statute law, must be construed according to the words and expressions used in the statute and not according to general rules and principles, at the risk of raising difficulties, uncertainties, and doubts, from which the law as it exists at present may be free, and which it may not be easy or even possible to foresee until the law, as altered, is subjected to the test of actual practice and experience."

MR. JUSTICE CRESSWELL: "I cannot but think that the abrogation of the common law will be attended with very considerable danger."

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

Among the changes in the law already made by Canadian statutes, in recent years, and now confirmed by the Criminal Code, are the following:

The abolition of appeal to the Privy Council. (51 V., c. 43, s. 1.)

The right of taking evidence of child, without oath. (53 V. c. 37, sec. 13).

The abolition of the right of aliens to a Jury de medietate linguæ. (R. S. C., c. 174, s. 161).

The abolition of Solitary Confinement, the Pillory, and *Deodands,* (R. S. C., c. 181, ss. 34, 35).

The Amendments in the law as to Seduction and Defilement of girls, Indecent Acts, Gross Indecency, Incest, Bigamy, Polygamy, Malicious Injuries, Procedure, etc. (53 V. c. 37, secs. 3–31.)

The punishment of Municipal corruption. (52 V., c. 42, s. 2.)

The Code provides that, in future, there shall be no committal for trial by a coroner; and that there shall be no jury *de ventre inspiciendo.*

It abolishes Attainder, Outlawry, and pleas in abatement.

The terms LARCENY, EMBEZZLEMENT, etc., are abolished, and the word THEFT is substituted, as a general term, to comprise all acts of *fraudulent taking,* and of *fraudulent conversion, misappropriation,* and *breach of trust.*

It also abolishes the distinction between felonies and misdemeanors, and modifies, in accordance with this change, the regulation of *arrests, bail, jury challenges,* etc.

The distinction, (for many years past merely nominal), between *principal offenders* and *accessories before the fact* is also abolished; and so, also, is the rule that a wife, committing an offence in the presence of her husband, is presumed to act under compulsion.

The terms "*malice*" and "*malice aforethought*" are discontinued; and corresponding changes are made in the definitions of *murder* and *manslaughter*.

As a general rule, no indictment can, in future, be preferred, without a preliminary enquiry before the Magistrates.

A prisoner may examine witnesses at the preliminary enquiry; and he may make admissions at his trial.

Writs of error are abolished, and alterations are made in regard to appeals and new trials; and, in particular, the right is given to the Minister of Justice to order a new trial.

The following appear to be new offences:

Breach of trust.
Being masked or disguised by night.
Bribery and corruption of or by a Judge or a member of parliament.
Conspiracy to bring a false accusation of crime.
Conspiracy to defile a woman.
Disobedience to orders of Court.
Fabricating evidence.
False accounting by clerks.
False statements by public officers.
Killing child in mother's womb.
Misconduct in respect to dead bodies.
Neglecting to obtain assistance in child birth.
Personation.
Selling offices.
Sending false telegrams.
Sending a telegram or letter in false name.
Spreading false news.
Stealing, between husband and wife, when living apart.

There are also, (amongst other changes and modifications noted in the comments), some alterations and amendments, of more or less importance, in regard to the following subjects:

Abduction.
Accessories after the fact.

Arson.
Articles of the Peace.
Amendments at Trial
Attempts.
Bigamy.
Burglary.
Calling the jury panel.
Compensation for loss of property.
Conspiracies.
Costs.
Disabilities.
Escapes and Rescues.
False statements by promoters, directors, &c. of Companies.
Forgery.
Indictments.
Indecent Acts.
Jurisdiction of General or Quarter Sessions.
Libel.
Limitations of time for prosecuting offences.
Manslaughter.
Mischief.
Murder.
Non-suspension of Civil Remedy.
Nuisances.
Obscene books, pictures, etc.
Perjury.
Rape.
Restitution.
Riots, etc.
Suicide.
Taking verdict on Sunday.
Trial.
Venue.
Witchcraft.

And, by sec. 4 of *the Canada Evidence Act* 1893, the accused and the husband or wife of the accused are made competent witnesses

THE

CRIMINAL CODE, 1892.

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

AN ACT RESPECTING THE CRIMINAL LAW.

[*Assented to 9th July*, 1892.]

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

TITLE I.

INTRODUCTORY PROVISIONS.

PART I.

PRELIMINARY.

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

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

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

(*a.*) The expression "any Act," or "any other Act," includes any Act passed or to be passed by the Parliament of Canada, or any Act passed by the legislature of the late province of Canada, or passed or to be passed by the legislature of any province of Canada, or passed

by the legislature of any province included in Canada before it was included therein ; R.S.C., c. 174, s. 2 (*a*).

(*b.*) The expression "Attorney-General" means the Attorney-General or Solicitor-General of any province in Canada in which any proceedings are taken under this Act, and, with respect to the 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*).

(*c*[1].) "Carnal knowledge" is complete upon penetration to any even the slightest degree, and even without the emission of seed.

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

(*e.*) The expression "Court of Appeal" includes the following courts : R.S.C., c. 174, s. 2 (*h*).

(i.) In the province of Ontario, any division of the High Court of Justice ;

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

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

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

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

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

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

(*h.*) The expression "document of title to lands" includes any deed, map, paper or parchment, written or printed, or partly written and partly printed, being or containing evidence of the title, or any part of the title, to any real property, or to any interest in any real property, or any notarial or registrar's copy thereof, or any duplicate instrument, memorial, certificate or document authorized or required by any law in force in any part of Canada respecting

registration of titles, and relating to such title ; R.S.C., c. 164, s. 2 (*b*).

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

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

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

A **criminal information** is an accusation of crime made against a person by the Attorney General or the Solicitor General without sending an indictment before a grand jury, and is usually filed, as explained by Sir James F. Stephen, " in cases of misdemeanors having a tendency to disturb the public peace or " to interfere with good government, as, for instance, cases of seditious " libels or other libels in which the public are interested, cases of official cor- " ruption or fraud or misconduct, cases of bribery." (1).

Although A PRESENTMENT is made of a true bill when found by a grand jury upon an indictment laid before them, a presentment properly,so called is a written charge made against a particular person by a grand jury accusing such person of an offence of which the grand jury have taken notice from their own knowledge and observation, without any previous indictment being laid before them. Lord Coke says, " every indictment is a presentment, but every presentment is not an indictment." (2)

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

If there are two or more persons, any one or more of whom, with the knowledge and consent of the rest, have any such 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*).

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(1) Steph. Dig. Cr. Proc., 126.
(2) 2 Inst. 739.

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

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

The Canada Temperance Act, 49 Vict. c. 106, s. 2, defines intoxicating liquors as "any and every spirituous or malt liquor and every wine and any and every combination of liquors or drinks that is intoxicating and any mixed liquor capable of being used as a beverage and part of which is spirituous or otherwise intoxicating."

And by the Quebec License Act 1878 the words intoxicating liquors mean, "brandy, rum, whiskey, gin, and wine of all descriptions, ale, beer, lager beer, porter cider and all other liquors containing an intoxicating principle, and all beverages, composed wholly or in part of any such liquors."

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

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

(*o*[1].) The expression "military law" includes *The Militia Act* and any orders, rules and regulations made thereunder, the Queen's Regulations and Orders for the Army; any Act of the United Kingdom or other law applying to Her Majesty's troops in Canada, and all other orders, rules and regulations of whatever nature or kind soever to which Her Majesty's troops in Canada are subject;

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

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

(*q.*) The expression "night" or "night time" means the interval between nine o'clock in the afternoon and six o'clock in the

forenoon of the following day, and the expression "day" or "day time" includes the interval between six o'clock in the forenoon and nine o'clock in the after-noon of the same day;

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

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

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

(*u.*) The expression "prison" includes any penitentiary, common gaol, public or reformatory prison, lock-up, guard room or other place in which persons charged with the commission of offences are usually kept or detained in custody;

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

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

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

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

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

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

(*y.*) The expression " Superior Court of Criminal Jurisdiction " means and includes the following courts :

(i.) In the province of Ontario, the three divisions of the High Court of Justice ;

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

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

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

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

(*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.

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

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

4. Meaning of expressions in other Acts. The expression " mail, " "mailable matter," " post letter," " post letter bag," and " post office " when used in this Act have the meanings assigned to them in *The Post Office Act*, and in every case in which the offence dealt with in this Act relates to the subject treated of in any other Act the words and expressions used herein in respect to such offence shall have the meaning assigned to them in such other Act.

The " Post Office Act," assigns to the above expressions the following meanings :—

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

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

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

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

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

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

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

(*a.*) Death ;

(*b.*) Imprisonment;

(*c.*) Whipping;

(*d.*) Fine ;

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

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

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

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

(*i.*) To pay costs ;

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

PART II.

MATTERS OF JUSTIFICATION OR EXCUSE.

7. General rule under 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.

8. General rule under this Act.—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.

10. Children between seven and fourteen.—No person shall be convicted of an offence by reason of an act or omission of such person when of the age of seven, but under the age of fourteen years, unless

he was competent to know the nature and consequences of his conduct, and to appreciate that it was wrong.

It is well established, as a general principle, that the essence of a criminal offence is the evil or wrongful intent with which the act is done. This is the doctrine embodied in the legal maxim, *Actus non facit reum nisi mens sit rea*, "the act itself does not make a man guilty unless his intention were so." (1) Of course this principle is not to be taken as absolute and without limitation. For instance, "whenever the law positively forbids a thing to be done, it becomes "thereupon *ipso facto* illegal to do it wilfully, or in some cases even ignorantly." (2) In general however, the intention of the party at the time of "committing an act charged as an offence is as necessary to be proved as any "other fact laid in the indictment, though it may happen that the proof of "intention consists in shewing overt acts only, the reason in such cases being "that every man is *prima facie* supposed to intend the necessary or even "probable or natural consequences of his own acts." (3)

But a child within the age of seven is considered without any capacity to discern good from evil or right from wrong, and is so conclusively presumed to be incapable of crime that this presumption cannot be rebutted. Between the ages of seven and fourteen there is still a presumption, but only *prima facie*, that the child is incapable, that is, the presumption is one which may be rebutted by clear and conclusive evidence of actual capacity. Therefore, when a child between seven and fourteen is charged with an offence it must be proved not only that he committed the act, but that he did it with a guilty knowledge of wrong doing. (4) This *primâ facie* presumption of incapacity will, undoubtedly, grow weaker and become easier of rebuttal as the child advances towards its fourteenth year. In one case, an infant, between eight and nine was found guilty of burning two barns, and, as it appeared, upon examination, that he had malice revenge craft and cunning, he was condemned to be hanged, and was executed accordingly. (5) In another case a child of ten, after killing his companion hid himself, and as it appeared by his hiding that he could discern between good and evil he was hanged. (6) And in 1748, at Bury Assizes, before Lord Chief Justice Willes a boy of ten was convicted on his own confession of murdering his bedfellow, a girl of about five years old, and as the whole of the boy's conduct shewed undoubted tokens of a mischievous discretion the judges all agreed that he was a proper subject for capital punishment. (7)

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.

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(1) Broom's Leg. Max. 6th Ed : 300.
(2) Broom's Leg. Max. 6th Ed : 301.
Reg. v. Prince, L. R., 2 C. C. R. 154.
(3) Broom's Leg. Max. 6th Ed : 304.
R. v. Moore, 3 B. and Ad. 188.
Reg. v. Hicklin, L. R. 3 Q. B. 375.
(4) 4 Bl. Com. 23.; 1 Bish. New Cr. Law Com. p. 219; Rex v. Owen, 4 Car. and P. 236; Rex v. Groombridge, 7 C. and P. 582.
(5) 1 Russ. Cr. 5th Ed. 110; Dean's case; 1 Hale 25, note (*u.*)
(6) 1 Russ. Cr. 5th Ed. 110; Spigurnal's case, 1 Hale 26.
(7) 1 Russ. Cr. 5th Ed. 110,-112. York's case Fost. 70 et seq.

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.

It will be seen by this section that the defence of insanity, in order to be of any avail must be supported by evidence establishing that the accused committed the offence, either—

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

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

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

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

Medical experts assert that, a knowledge of the wrongfulness of an act may co-exist with insanity, that, " in all lunatics and in the most degraded idiots the " feeling of right and wrong may be proved to exist," and that, " the whole " management of insane asylums presupposes a knowledge of right and wrong on " the part of their inmates." (1) On this account it is contended by some that the legal rule of responsibility should include " not only the *knowledge* of good and " evil but the *power to choose* the one and *refrain* from the other"; (2) and that therefore it should be a good defence to establish that the accused's insanity prevented him from controlling his actions and rendered him unable to refrain from doing the act, although he knew it tobe wrong. (3) This is said to be the law under the French and the German Codes ; and the same principle has been adopted by some American Courts. (4) Sir James F. Stephen has stated that it is even the law of England. For, although the foregoing article of our code is identical, in meaning, if not in exact wording, with section 22 of the Draft of the English Criminal Code, as revised by the four Royal Commissioners appointed to consider and report thereon, and although in their joint report those Commissioners declared that section 22, as so revised by them. expressed the existing law, Sir James F. Stephen,—who was one of the Commissioners,—

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(1) Bucknill Cr. Lun., 59 ; Guy and F. Forensic Med., 220.
Woodman & Tidy, For. Med., 874,875 ; Miller's case, 3 Couper, 16-18.
1 Bish. New Cr. Law Com., pp. 232-7.
1 Beck. Med. Jur., 10 Ed., 723, 724.

(2) Browne's Med. Jur. of Ins., s.s. 13-18 ; Ray Med. Jur., s.s. 16-19 ; Whart. & Stiles Med. Jur., s. 59.

(3) Com. v. Mosler. 4 Pa., 264, 267 ; 1 Bish. New Cr. Com., p.p. 224, 239, 240.

(4) 13 Cr. Law Mag., 28; Bradley v. State, 31 Ind. 492 ; Parsons v. State (Ala.), 9 Cr. Law Mag., 812-828.

has expressed a different opinion, and, in giving, in one of his books, his understanding of the law of England on this subject, he there says that, "no act "is a crime if the person who does it is, at the time when it is done, *prevented.* "either by defective mental power or by any disease affecting his mind, *from* "*controlling his own conduct.*" And again he says, "It has been thought "that the law of England is that the fact that a man is disabled from controlling "his conduct by madness is not, if proved, a good defence to a charge of crime "in respect of an act so done. This appears to me to be a mistake traceable "in part to a misunderstanding of the meaning and in part to an exaggeration "of the authority of the answers of the judges in MacNaghten's case." (1)

The view here taken by Sir James F. Stephen does not, however, appear to be the one taken by English judges in general. For instance, in a case of shooting and wounding in 1812; Mr. Justice LeBlanc charged the jury that if they were of opinion that the prisoner was, when he committed the offence, capable of distinguishing right from wrong, and was not under the influence of any illusion which disabled him from discerning that he was doing a wrong act, he would be guilty in the eye of the law. (2) In another case where the prisoner was on trial for murder, Chief Justice Mansfield told the jury that in order to support the defence of insanity it ought to be proved, by the most distinct and unquestionable evidence, that the prisoner was incapable of judging between right and wrong. (3) And in a case where the prisoner was charged with shooting at the Queen, Lord Denman, C. J., said to the jury, "The question is whether the prisoner was laboring under that species of "insanity which satisfies you that he was quite unaware of the nature character "and consequence of the act he was committing, or, in other words, whether "he was under the influence of a diseased mind, and was really *unconscious,* "at the time he was committing the act, *that it was a crime.*" (4) In effect the same doctrine was laid down by Lord Lyndhurst in a murder trial at Bury in 1831; (5) by Baron Bramwell in Hayne's case; (6) by Baron Parke, in Barton's case; (7) by Mr. Justice Maule, in Higginson's case; (8) by Mr. Justice Wightman in Burton's case; (9) by Chief Justice Erle in Leigh's case; (10) by Chief Justice Tindal in MacNaghten's case; (11) and by Baron Martin in the Townley murder case in 1863. (12) In a still more recent case of murder at Chatham, in 1875, Mr. Justice Brett said. "The man may be mad. I assume that he is so in the "medical sense of the term; but the question here is whether he is so mad as "to be absolved from the consequences of what he has done? He is not so "absolved, though he is mad, if he be not so mad as not to know what he was "doing, or not to know that he was doing wrong." (13)

Drunkenness.—With regard to derangement of the mind by the use of intoxicating liquors, the rule is that if drunkenness be contracted voluntarily it will not relieve a person from responsibility for a criminal offence committed by him while in a drunken condition, whether at the time he knows what he is doing or not. (14) Still if the act be one which must, in order to render it a criminal offence, be done with some particular intent, the fact of its being done

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(1) Steph. Gen. View, Cr. Law, 78, 80.
(2) Bowler's case, Collis. Lun., 673; 1 Russ. Cr., 5 Ed., 117, 118.
(3) Bellingham's case, Collis Addend., 636; 1 Russ. Cr. 118.
(4) Reg. v. Oxford, 9 C. & P., 525; 1 Russ. Cr., 119.
(5) Rex. v. Offord, 5 C. & P., 168; 1 Russ. Cr., 119.
(6) Reg. v. Haynes, 1 F. & F., 666; 1 Russ. Cr, 131.
(7) Reg. v. Barton, 3 Cox C. C., 275; 1 Russ. Cr., 126.
(8) Reg. v. Higginson, 1 C. & K., 129; 1 Russ. Cr., 124.
(9) Reg. v. Burton, 3 F. & F., 772; 1 Russ. Cr., 127, 128.
(10) Reg. v. Leigh, 4 F. & F., 915; 1 Russ. Cr., 132, note (*e*).
(11) Reg. v. MacNaghten, 10 Cl. & F., 200; 1 Russ. Cr., 121; Woodman & Tidy, 872.
(12) Reg. v. Townley, 3 F. & F., 839; 1 Russ. Cr., 129, 130.
(13) Reg. v. Blomfield, Vide "Lancet," July 31, 1875; Woodman & Tidy, 871.
(14) Bl. Com., 26; 1 Hale, 32; 1 Hawk., P. C., c. 1, s. 6; 1 Russ. Cr., 114.

when the offender is in a state of intoxication should be taken into account in deciding whether he has such intent or not. (1)

If the drunkenness be involuntary, as if a person be made drunk by stratagem or fraud, or by some mistake, as by a physician unskilfully administering some drug or intoxicant to a patient, or if a man become intoxicated in any other way than by his own voluntary act, he will not be responsible for an offence committed while so affected to an extent which prevents him from knowing what he is doing or from knowing that he is doing wrong. (2) Or, if by habitual drinking a person become affected by a fixed frenzy, delirium tremens, or other form of insanity, whether permanent or intermittent, he cannot be held responsible for an act done by him while thus affected, if he be thereby rendered incapable of knowing that the act is wrong, or if he be thereby subjected to some specific delusion causing him to believe in the existence of some state of things which, if real, would justify or excuse his act. (3)

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

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

ILLUSTRATIONS.

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

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

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

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(1) Rex v. Meakin, 7 C. & P., 297; Reg. v. Monkhouse, 4 Cox C. C., 55; Reg. v. Cruse, 8 C. & P., 541-546; R. v. Moore, 6 Law Rep. (N. S.), 581; 3 C. & K., 319; 1 Russ. Cr., 115; Steph. Gen. View Cr. Law, 81; King v. State (Ala.), 8 So. Rep., 856; 13 Cr. Law Mag., 654; Chatham v. State (Ala.), 9 So. Rep., 607; 13 Cr. L. Mag., 938; 1 Bish. New Cr. L. Com. 253.

(2) 1 Russ. Cr., 5 Ed., 114; Co. Lit., 247; 1 Hale, 32; 1 Bish. New Cr. Law Com., 250.

(3) 1 Hale, 30; 1 Russ. Cr., 114; U. S. v. Drew, 5 Mason, 28; Burrow's case, 1 Lewin, 25.

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

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

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

ILLUSTRATION.

"If A, by force take the arm of B, in which is a weapon, and thereby kill C, "A is guilty of murder, not B;" (1) for B, in this instance, is as unwittingly the instrument of A, as, if he were inanimate or unconscious; and his own will has nothing at all to do with the act, which is as exclusively the act of A as if the weapon were in the latter's hand instead of in B's.

Compulsion by necessity.—The law of necessity is paramount over all other laws; and it has been well said that every law of man, common law or statutory law, has in it the implied exception, which is of the same force as if expressed, that obedience shall not be required when it is impossible, and that an act which is unavoidable is no crime. (2) And, as everything which is necessary for a man to do to save his life is treated as compelled, it follows that if I am attacked by a ruffian who seeks my life, I may kill him if I cannot otherwise preserve my own life. (3) And, if during an embargo a vessel is by stress of weather compelled to put into a foreign port and there sell her cargo, for the preservation of the lives and property on board, she will not be adjudged guilty of a breach of the Embargo Act. (4)

ILLUSTRATIONS.

A & B swimming in the sea after a shipwreck, get hold of a plank not large enough to support both. A pushes off B who is drowned. A commits no crime. (5)

A doctor kills a child in the act of birth as the only way to save the life of the mother. The doctor is justified. (6)

Where shipwrecked sailors and passengers were escaping in a boat which would not hold all, the sailors threw some of the passengers overboard. Held that, unless the presence of the sailors was necessary for the common safety, the passengers should have been kept in the boat in preference to the sailors. (7)

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.

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(1) 1 Russ. Cr., 5 Ed., 139; 1 East. P. C., 225.
(2) Reg. v. Dunnett, 1 Car. & K., 425.
(3) 4 Bl. Com., 183.
(4) The "William Gray," 1 Paine, 16; 1 Bish. New Cr. Law Com., § 351.
(5) Bacon's Max., No. 5; Burbridge Dig. Cr. Law, 38; 1 Hawk., c. 28, s. 26.
(6) Step. Gen. View Cr. Law, 2d Ed., 77.
(7) U. S. v. Holmes, 1 Wall Jr., 1; Burbridge Dig. Cr. Law, 37.

This article very properly abrogates the common law doctrine by which a wife who committed any crime, other than treason or murder, in her husband's presence or company, was *prima facie* presumed to act under his coercion. (1) Blackstone says that in his day this rule was at least a thousand years old in England, and that among the northern nations of Europe the privilege extended to every woman transgressing in company with a man, the indemnity being similar to that accorded to every slave who committed a joint offence with a freeman. Its origin is thus clearly derivable from the old barbaric notions of the abject position of the wife in the matrimonial relation.

Under this old rule it was held in one case where a wife went from house to house uttering base coin, her husband accompanying her, but remaining outside, that her act must be presumed to have proceeded from his coercion. (2) While, however, the common law protected a wife from punishment for any ordinary crime committed by her under the coercion of her husband, or in his company, which was construed as a coercion, (3) still as the husband's presenoe merely raised a *prima facie* presumption of coercion, if the evidence clearly shewed that she was not drawn to the offence by the husband, or if she were the principal inciter of it she was punishable as well as her husband. (4) And if she committed an offence voluntarily, or by the bare command, but without the actual presence of the husband, at the time of committing the offence, she was punishable. (5) Thus, where a woman was tried for uttering a forged order and her husband for procuring her to commit the offence, and it appeared that although her husband had ordered her to do it, he was not present when she did it, the judges, upon a case reserved, held that the presumption of coercion did not arise, as the husband was absent at the time of the uttering, and that the wife was properly convicted of the uttering and the husband of the procuring. (6) And, again, where the husband was a cripple and confined to his bed, his presence when the wife committed a crime did not exonerate her; (7) probably because it was considered that the ordinary *prima facie* presumption of his presence being a coercion was destroyed by the stronger presumption that in his crippled condition he was unable to coerce her.

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

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

The doctrine embodied in this article is founded upon the general principle that every person is presumed to know the law. (8) This presumption is so strong that it has been held to be no defence for a foreigner, charged with a crime committed in England, to shew that the act was no offence in his own country, and that he did not know he was doing wrong in doing it in England. (9) And a foreigner, while on board a British ship, which he has entered voluntarily, is as amenable to British law as if he were on British land. (10) Where a defendant was convicted of malicious shooting on the high seas upon an indictment laid under a special statute passed only a few weeks before the offence was committed and of which statute no notice could have reached the place where the shooting

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(1) 1 Hale, 45; 1 Hawk. P. C., c. 1, s. 9; 4 Bl. Com., 28.
(2) Connolly's case, 2 Lewin, 229; 1 Bish. New Cr. L. Com., p.p. 214, 215.
(3) 1 Russ. Cr., 5 Ed., 139; 1 Hale. 45; 4 Bl. Com., 28.
(4) 1 Hale, 516.
(5) 1 Russ. Cr., 5 Ed., 140; 1 Hawk. P. C., c. 1, s. 11.
(6) Rex v. Morris. East. T., 1814, M.S. Bayley, J., & Russ. & Ry., 270.
(7) Reg. v. Cruse, 2 M. C. C. R. 53; 1 Russ. Cr., 147.
(8) Brown's Leg. Max., 6 Ed., 247 et seq., 4 Bl. Com., 27; 1 Hale, 42; R. v. Crawshaw, Bell 303.
(9) Rex v. Esop, 7 C. & P., 456; Barronet's case, 1 E. & B. 1; 1 Dears C. C. R., 51; 1 Russ., 5th Ed., 154.
(10) Reg. v. Sattler, Reg. v. Lopez, D. & B. C. C., 525.

happened, the conviction was nevertheless considered perfectly legal: although the judges recommended a pardon. (1)

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

Ignorance or mistake of fact.—Although ignorance of the law is no excuse, it is otherwise with regard to ignorance or mistake in point of fact, which as a general rule will be a good and sufficient excuse; (2) for a mistake of fact may negative the existence of an evil intent, which is the essence of a crime; so that whenever any one, without fault or carelessness, is, while pursuing a lawful object, misled concerning facts, and acts upon them as he would be justified in doing were they what he believes them to be, he is legally as well as morally innocent. But the rule will not apply if the mistake be made in the course of doing any unlawful act, and therefore if some unintended or unforeseen consequence ensue from an act which in itself is wrongful and unlawful, the actor will be as criminally responsible as if the consequence were intended and foreseen; (3) nor will the rule apply if the mistake be due to any negligence or want of due diligence; at least it will not apply so as to exonerate a person entirely.

ILLUSTRATIONS.

A, in his own house strikes a blow under the mistaken though *bona fide* belief that he is striking at a concealed burglar, but by this blow he kills B, a member of his own family. A is guilty of no offence (4)

B, pretending by way of a practical joke to be a robber, presents an empty pistol at A and demands his money. A, believing that B really is a robber, kills B. A is justified. (5)

A kills B, a friendly visitor through *negligently* mistaking him for a burglar. Although A cannot be convicted of murder he may be convicted of manslaughter by reason of his having *negligently* failed to acquaint himself with the true state of affairs. (6)

And where a physician was indicted for malpractice, it was no defence that he was ignorant of facts with which it was his duty to become acquainted. (7)

When a statute makes an act indictable, irrespective of guilty knowledge of some fact connected with it, ignorance of the fact will be no defence. (8) Take the following illustration given by Sir James F. Stephen: "A abducts B, a girl "of 15 years of age, from her father's house believing in good faith and on "reasonable grounds that B is 18 years of age. A commits an offence, although if "B had been 18 years of age she would not have been within the statute." (9)

15. Execution of sentence.—Every ministerial officer of any court authorized to execute a lawful sentence, and every gaoler, and every

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(1) Rex v. Bailey, Russ. & Ry. 1.

(2) 4 Bl. Com., 27; 1 Hawk. P. C. Curw. ed., p. 5, § 14, note; 1 Bish. New Cr. Law Com., 171.

(3) Arch. Cr. Pl., 24; Clarke's Cr. Law, 70.

(4) Reg. v. Levitt, Cro. Car. 558; 1 Hale 474; Burbridge Dig. Cr. Law. 40.

(5) 1 Hale, P. C. 474; Burbridge Dig. Cr. Law, 41.

(6) Hudson v. MacRae, 4 B. & S. 585; Whart. Cr. Law, 8 Ed. § 89.

(7) R. v. Macleod, 12 Cox C. C. 534. See also article 212 post p.

(8) 1 Stark. C. P. 196; Sedg. Stat. Law, 2d Ed. 80; R. v. Myddleton, 6 T. R. 739; R. v. Jukes, 8 T. R. 536; Whart. Cr. Law, § 88.

(9) Steph. Dig. Cr. Law, Art. 34; R. v. Prince, L. R. 2 C. C, R. 154.

person lawfully assisting such ministerial officer or gaoler, is *justified* in executing such sentence.

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

17. Execution of 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.

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

In their comments upon sections of the English Draft Code of the same import as the foregoing articles 15 to 18, the Royal Commissioners said, "The result "of the authorities justifies us in saying that wherever a ministerial officer, who "is bound to obey the orders of a court or magistrate, (as, for instance, in "executing a sentence or effecting an arrest under warrant), and is punishable "by indictment for disobedience, merely obeys the order which he has received, "he is *justified*, if that order was within the jurisdiction of the person giving it. "And we think that the authorities shew that a ministerial officer obeying an "order of a court or the warrant of a magistrate, is *justified* if the order or "warrant was one which the court or magistrate could under any circumstances "lawfully issue, though the order or warrant was in fact obtained improperly, "or though there was a defect of jurisdiction in the particular case which might "make the magistrate issuing the warrant civilly responsible; on the plain "principle that the ministerial officer is not bound to enquire what were the "grounds on which the order or warrant was issued and is not to blame for "acting on the supposition that the court or magistrate had jurisdiction."

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 responsability* if he acts in good faith under the belief that the sentence or process was that of a court having juris-

diction 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 appointement or commission did not exist or had expired, or although in fact the court or the person passing the sentence or issuing the process was not the court or the person authorized by the commission to act, or the person issuing the warrant was not duly authorized so to act.

It will be seen that article 18 protects an officer who executes the sentence or warrant of a court or person having jurisdiction, generally speaking, but acting, in the particular case in hand, either without or in excess of such jurisdiction or outside of his or its district; and that article 19 protects an officer in executing in good faith a sentence or warrant which he believes has been passed or issued by a duly authorised court or person, if it be proved that it was passed or issued by such court or person under some color of lawful authority.

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

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

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

This article makes an important change. By the common law, if an officer having a warrant for one person, arrested another, the arrest was illegal and unjustifiable. For instance, in one case a magistrate issued a warrant upon a criminal charge against a man who was described in the warrant by the name of John H. Under this warrant the constable arrested Richard H.; and, although the man so arrested was in reality the person against whom the warrant was intended, and was pointed out, as such, to the constable, by the prosecutor who supposed the man's name to be John H., Mr. Justice Coltman directed the jury, and his ruling was afterwards upheld, that a person could not be lawfully taken under a warrant describing him by a name that did not belong to him, unless he had assumed or called himself by the wrong name. (1)

Of course, as a constable could always apprehend, without warrant, any one suspected on reasonable grounds of having committed a felony he was able to justify an arrest, on that ground, although he had a warrant which happened to be illegal. (2)

(1) Hoye v. Bush, 1 M. & Gr. 775, 780; 1 Russ. Cr. 5th Ed. 738; Rex v. Hood, R. & M. C. C. R. 281.

(2) Hoye v. Bush, 1 M. & Gr. 775, 780; 1 Russ. Cr. 710.

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

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: (1) Provided, that it shall be a question of law whether the facts of which there is evidence may or may not constitute culpable ignorance or negligence in his so believing the warrant or process to be good in law.

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

ARRESTS WITHOUT WARRANT.

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

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

As the common law justified a constable in making an arrest without warrant, upon a reasonable ground of suspicion of a felony having been committed, although no felony had in fact been committed, (2) it was, in so far as felonies were concerned, identical with the law as now made applicable by article 22 to the particular offences (enumerated in article 552), for which offenders may be arrested without warrant.

Of course, the grounds of belief upon which a peace officer acts under this provision of the law must, as shewn by all the authorities in point, be such as

(1) See article 14, *ante* p 14.

(2) Beckwith v. Philby, 6 B. & C. 635; Davies v. Russell, 5 Bing. 354; Hogg v. Ward, 27 L. J. Ex. 443; 2 Hale 79-93; 1 Russ. Cr. 5 Ed. 721; Cowles v. Dunbar, M. & M. 37; 2 Oke's Magist. Syn. 913.

would lead any reasonable person, acting without bias or prejudice, to believe the arrested party guilty of the offence. (1)

During the discussion of the clauses of the Code in Committee of the House of Commons, Sir John Thompson in referring to article 22 said, "This section is "to provide for the exoneration of the officer where an offence has not been "committed. It is intended to apply to a class of cases in which an offence has "been attempted but not completed. As, for example, the well-known case, "which has been decided both ways in England, of a man arrested for picking "a pocket, when it turned out there was nothing in the pocket. (2) In that case, "without this principle of law, the officer would be a trespasser. Again, an "officer has reason to believe from what he hears and sees that a rape has been "committed. It may turn out that the offender has only been guilty of an "indecent assault, that the offence was not completed. Under this section the "officer would be exonerated. Again, an officer going along a highway finds a "homicide has been committed, and he makes an arrest. It may turn out that "the homicide was excusable. In all these cases the officer has acted promptly "on information that would satisfy any reasonable man, and he does so at the "peril of justification which he can only obtain when a judge decides that he "has had reasonable and probable grounds on which to make the arrest."

24. **Arrest by any person without warrant.**—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. 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.

26. 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.

The offences for which an offender *found committing* any of them may be arrested without warrant are enumerated in Article 552, sub-section 1; and, alphabetically arranged, they are as follows:

Assaults on the Queen, (Article 71).
Administering, taking or procuring unlawful oaths, (Articles 120, 121).
Abduction, (Article 281).
Arson, setting fires, etc. (Articles 482, 483, 484, 485).
Attempt to damage by explosives, (Article 488).
Being at large while under sentence of imprisonment, (Article 159).
Breaking prison, (Article 161).
Bringing stolen property into Canada, (Article 355).
Breaking place of worship, (Articles 408, 409).
Burglary, housebreaking, shopbreaking, etc. (Articles 410, 411, 412, 413, 414).
Being found in a dwelling by night, (Article 415).
Being found armed with intent to break a dwellinghouse, (Article 416).

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(1) Allen v. Wright, 8 C. & P. 522; Leete v. Hart, 37 L. J., C. P. 157; L. R., 3 C. P. 322; Greenwood & M's Magist. Guide, 2nd Ed. 117.

(2) See Reg. v. Collins, L. & C. 471; and Reg. v. Brown, 24 Q. B. D. 357, cited under article 64 *post* p. 140.

Being disguised or in possession of housebreaking instruments, (Article 417).
Counterfeiting seals; Counterfeiting stamps, (Articles 425, 435).
Counterfeiting gold and silver coin; Making coining instruments; Uttering counterfeit current coin, (Articles 462, 466, 477).
Clipping current coin; Possessing clippings, (Articles 468, 470).
Counterfeiting copper coin, (Article 472).
Counterfeiting foreign gold and silver coin, (Article 473).
Defiling children, (Article 269).
Demanding by threatening letters, (Article 403).
Demanding with intent to steal, (Article 404).
Endangering persons on railways, (Articles 250, 251).
Escapes, (Articles 163, 164).
Extortion by threats, (Article 405).
Forcibly compelling execution of documents, (Article 402).
Forgery; Uttering forged documents; Possessing forged bank notes; Using probate obtained by forgery or perjury; Making, having or using forgery instruments, (Articles 423, 424, 430, 432, 434).
Falsifying registers, (Article 436).
Inciting to mutiny, (Article 72).
Injuring or attempting to injure by explosives, (Articles 247, 248).
Injuring electric telegraph, etc. (Article 492).
Interfering with marine signals, (Article 495).
Murder; Attempt to murder; Accessory to murder, (Articles 231, 232, 235).
Manslaughter, (Article 236).
Mischief on railways, etc. (Articles 489, 498, 499).
Piracy; Piratical Acts; Piracy with violence, (Articles 127, 128, 129).
Personation, (Article 458).
Riot Act, Offences respecting reading of, (Article 83).
Riotous destruction; Riotous damage, (Articles 85, 86).
Rape; Attempt to commit rape, (Articles 267, 268).
Receiving stolen property, (Article 314).
Robbery; Aggravated robbery; Assault with intent to rob, (Articles 398, 399, 400).
Stopping the mail, (Article 401).
Suicide, Attempt at, (Article 238).
Stupefying in order to commit indictable offence, (Article 244).
Treason; Accessory; Treasonable offences, (Articles 65, 67, 68, 69, 70).
Theft by agent, etc. (Article 320).
Unnatural offence, (Article 174).
Wreck, preventing escape from, (Article 254).
Wrecking; Attempt to wreck, (Articles 493, 494).
Wounding, (Articles 241, 242).

"FOUND COMMITTING" has been held to mean either seeing the party actually committing the offence or pursuing him immediately or continuously after he has been seen committing it; so that to justify the arrest, without warrant, of an offender on the ground of his being *found committing* an offence, he must be taken in the very act of committing it, or there must be such fresh and continuous pursuit of him from his being seen and surprised in the act until his actual capture that the finding him in the act and his subsequent pursuit and capture may be considered to constitute one transaction. (1) Immediately means immediately after the *commission* of the offence, and not immediately after the *discovery* of its commission. Pursuit after an interval of three hours would not be a fresh pursuit. (2) It seems that if the offender be seen in the commission of the offence by one person he may be apprehended by another who did not see him committing it. (3)

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(1) R. v. Curran, 3 C. & P. 397; 1 Russ. Cr., 5 Ed. 715; Hanway v. Boultbee, 1 M. & R. 15; Clarke's Magist. Man. 42:
(2) Downing v. Capel, L. R. 2 C. P. 461; Leete v. Hart, 37 L. J., C. P. 157.
(3) Rex v. Howarth, R. & M., C. C. R. 207: 1 Russ. Cr. 716 note (*g*).

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

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

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.

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

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.

It will be noticed that in some of the foregoing articles the word "*justified*" is used, while in others the words used are "*protected from criminal responsibility*." The different meanings intended to be conveyed by these two expressions are explained in the following extract, bearing on the subject, taken from the report of the English Commissionners: "There is a difference in the "language used in the sections in this part which probably requires explana- "tion. Sometimes it is said that the person doing an act is '*justified*' in so "doing under particular circumstances. The effect of an enactment using that "word would be not only to relieve him from punishment, but also to afford him "a statutable defence against a civil action for what he had done. Sometimes "it is said that the person doing an act is '*protected from criminal respon-* "*sibility*' under particular circumstances. The effect of an enactment using "this language is to relieve him from punishment, but to leave his liability to "an action for damages to be determined on other grounds, the enactment "neither giving a defence to such an action where it does not exist, nor taking it "away where it does. This difference is rendered necessary by the proposed "abolition of the distinction between felony and misdemeanor. We think that "in all cases where it is the duty of a peace officer to arrest, (as it is in cases "of felony), it is proper that he should be protected, as he is now, from civil as "well as from criminal responsibility. And as it is proposed to abolish the "distinction between felony and misdemeanor on which most of the existing "law as to arresting without a warrant depends, we think it is necessary to "give a new protection from all liability (both civil and criminal) for arrest in "those cases which by the scheme of the Draft Code are (so far as the power of "arrest is concerned) substituted for felonies. In those cases therefore which "are providod for in,"—(Here are mentioned the number of sections of the English Code which are identical with articles 22, 23, 24, 27, 28 of our Code),— "the word '*justified*' is used. A private person is by the existing law protected "from *civil* responsibility for arresting without warrant a person who is on "reasonable grounds believed to have committed a felony, provided a felony has "actually been committed, but not otherwise. In section 35,"—(identical with our article 25),—"providing an equivalent for this law, the word used is "'*justified*.' On the other hand, where we suggest an enactment which extends "the existing law for the purpose of protecting the person from *criminal* pro- "ceedings, we have not thought it right that it should deprive the person

" injured of his right to damages. And in cases in which it is doubtful whether " the enactment extends the existing law or not, we have thought it better not " to prejudice the decision of the civil courts by the language used. In cases " therefore such as those dealt with by,"—(Here are mentioned the numbers of " sections of the English Code which are identical with Articles 19, 20, 21, 26, " 29, 36, 37 of our Code),—" we have used the words '*protected from criminal* " *responsibility*.' "

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

With regard to a peace officer's powers, the effect of Articles 22, 27 and 28 seems to be that he will be *justified* (that is relieved from civil as well as criminal responsibility), in making an arrest without warrant in any of the following cases:

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

2. When the person whom he arrests is found, by the peace officer himself, in the act of committing any offence whatever.

3. When the person whom he arrests is found by the peace officer lying or loitering in any highway, yard or other place, by night, and he has good cause to suspect the person, so found by him, of having committed or being about to commit any offence for which an offender may be arrested without warrant, that is to say any of the offences enumerated in Article 552, sub-section 1, and alphabetically arranged under Article 26.

4. When the person whom he arrests is *found committing* any offence enumerated in sub-section 2 of Article 552, which offences, arranged alphabetically, are as follows:

Attempting to injure or poison cattle, (Article 500).
Cruelty to animals, (Article 512).
Cutting booms, or breaking loose rafts or cribs of timber, (Article 497).
Counterfeiting foreign copper coin, (Article 473).
Exporting counterfeit coin, (Article 465).
Keeping cock-pit, (Article 513).
Obtaining by false pretense, (Article 359).
Obtaining execution of valuable securities by false pretense, (Article 360).
Possessing counterfeit current coin, (Article 471).
Possessing counterfeit foreign gold or silver coin, (Article 473).

With regard to a private individual the effect of Articles 23, 24, 25 and 28 is that he will be *justified* (that is, relieved from civil and criminal responsibility), in any of the following cases:

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

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

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

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

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

1. In making an arrest without warrant of any one whom, on reasonable and

probable grounds, *he believes* he finds committing *by night* any offence for which an offender may be arrested without warrant.

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

Under Article 552, sub-sections 5 and 6, an arrest, without warrant, may also be made in the following cases (*a*) Any one found committing any offence against the Code upon any property may be arrested by the owner of such property or by any person authorized by such owner; and (*b*) any one found committing any of the offences mentioned in section 119, (conveying intoxicating liquor on board any of Her Majesty's ships, etc., etc.), may be arrested by certain officers, petty officers and non-commissioned officers.

It will be seen, therefore, that, on the one hand, a peace officer arresting without warrant a person whom he suspects on reasonable grounds of having committed one of the offences enumerated in Article 552, sub-section 1, will be *justified* not only if the person so arrested be innocent, but even if the suspected offence has not been committed at all (Article 22); while, on the other hand, a private individual making such an arrest must in order to be *justified* shew that the suspected offence has been actually committed, (Article 25). Again, while a peace officer will be *justified* in arresting any person whom he himself finds *at any time* (whether by day or by night) committing any offence whatever, (Article 27), it is different with regard to a private individual; for it is only when he finds an offender committing the offence in the *night* time, (Article 28), that a private individual is *justified* in making an arrest without warrant for any offence outside of those enumerated in Article 552, sub-section 1. If it be in the day time that he finds an offender committing an offence, the offence in order to justify him in making the arrest without warrant, (Article 24), must be one of those enumerated in Article 552, sub-section 1, or, if not one of those, it must be one which is being committed against property of which such private individual is the owner, (Article 552, sub-section 5).

ILLUSTRATIONS.

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

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

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

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

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

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

A, a peace officer, finds B loitering in a yard by night, and has good cause to

suspect B of being about to commit arson. A is justified in arresting B without warrant.

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

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

A, a private individual, finds B in the act of stealing and carrying away some of A's clothing or other effects. A is justified in arresting B without warrant.

Under sec. 26 of the Criminal Procedure Act, R. S. C., c. 174, a person to whom any property was offered for sale or for pawn was, if he had reasonable cause to suspect that an offence had been committed on or with respect to such property, empowered to apprehend and carry before a justice of the peace the person offering the same, together with such property, to be dealt with according to law. But it will be seen, by Article 981 and schedule two of the Code, that this clause is repealed in common with the whole of chapter 174, R.S.C.

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

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

This article is copied from section 41 of the English Draft Code, and is based upon the principle that, as in making an arrest or in executing any sentence, warrant, order, or process, a peace officer or other person legally authorized acts under legal command or compulsion he may, if resisted, repel force with force; and if, in using reasonable and necessary force to overcome resistance, the officer should happen, in the struggle, to kill the person resisting or any of his accomplices, he will be exonerated; while, on the other hand, if death should ensue to the officer or any one assisting him, the persons so resisting will be guilty of murder. (1)

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 praticable 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

(1) Fost. 270, 271, 318; 1 Hale, 494; Reg. v. Porter, 12 Cox, C. C. 444; 1 Russ Cr., 5 Ed. 710, 711.

process or warrant might not have been executed, or the arrest effected, by reasonable means in a less violent manner.

The third clause of this article is believed to alter the common law.

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

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

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

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

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

These two articles (36 and 37) seem to extend the common law so far as regards private persons. (1)

38. Preventing breach of the peace.—Every one who witnessess a breach of the peace is *justified* in interfering to prevent its continuance or renewal and may detain any person committing or about

(1) 2 Hale, 83.

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

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

It appears to have always been competent for a peace officer and even for a private individual to suppress or prevent the continuance of a breach of the peace, committed in his presence, as well as to arrest the persons committing it. (1) " The Common law, right and duty of conservators of the peace and of all " persons (according to their power) to keep the peace and to disperse, and, if " necessary, to arrest those who break it, is obvious and well settled." (2) In the case of an affray, peace officers have even been justified in breaking doors open, in order to suppress it, or in order to apprehend the affrayers, and either to carry them before a justice, or by their own authority, imprison them for a convenient time, until the heat was over. (3)

But, what is a breach of the peace ? It is said, in regard to the criminal law of England, that, " the foundation of the whole system of criminal procedure " was the prerogative of keeping the peace, which is as old as the monarchy " itself, and which was, as it still is, embodied in the expression, 'The King's " Peace,' the legal name of *the normal state of society*." (4) It may, therefore, be safely asserted that, as all crimes, being public wrongs, tend more or less to affect or disturb, directly or indirectly, the good order and tranquility so essential to the general welfare of a community, the commission of an offence will nearly always include or involve a breach of the peace. But there are some offences which are directed more particularly against the public peace; or in which the breach of the peace is the prominent feature, such, for example, as an affray, an unlawful assembly, a riot, and the like. (5) An affray, (from *affraier*, to terrify), was by the common law the act of two or more persons fighting in some public place to the alarm of the public. If the fight were in private, it was no affray, but an assault ; (6) and mere quarrelsome or threatening words would not amount to an affray; although a person, even when he uses no actual force himself, may nevertheless be guilty of an affray by, for example, assisting at a prize fight. (7) An unlawful assembly was the meeting together,—in a manner likely to endanger the peace,—of three or more persons for the carrying out of some common purpose of a private nature, there being no aggressive act actually

(1) Timothy v. Simpson, 1 C. M. & R. 760 ; Ingle v. Bell, 1 M. & W. 516 ; Grant v. Moser, 5 M. & G. 123 ; 1 Russ. Cr. 714 ; 1 Hawk. P. C., c. 63, s. 13.
(2) 1 Steph. Hist. Cr. Law, 201.
(3) 4 Steph. Com, 7 Ed. 252.
(4) 1 Steph. Hist. Cr. Law, 184.
(5) 4 Steph. Com. 7 Ed. 238 ; Harris Cr. Law, 3 Ed. 108.
(6) 4 Steph. Com. 251-2.
(7) Harris Cr. Law, 4 Ed. 111.

done. (1) When the persons thus unlawfully assembled proceeded or moved forward to the execution of their purpose, but did not get to the point of actually executing it, it was called a rout; (2) and if they went on to the actual execution of their purpose, in a violent and alarming manner, it was a riot. (3)

These differences are illustrated thus:

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

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

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

The gist of these offences has always been, not the lawfulness or the unlawfulness of the object in view, but the unlawful manner of proceeding, that is, with circumstances of force or violence calculated to inspire terror. And therefore it appears that, assembling for an unlawful object and actually executing it would not be a riot, if done peaceably. (4)

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

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

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

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

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

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

SUPPRESSION OF RIOT.

40. 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.

41. 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,

(1) R. v. Vincent, 9 C. & P. 91.
(2) 1 Hawk., P. C., c. 65, s. 8.
(3) 1 Hawk., P. C., c. 66, s. 1.
(4) Hawk. c. 65, s. 9; Harris Cr. Law, 4 Ed. 110.

for the suppression of a riot, is justified in obeying the orders so given *unless such orders, are manifestly unlawful*, and is *protected from criminal responsibility* in using such force as he, on reasonable and probable grounds, believes to be necessary for carrying into effect such orders.

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

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

"The protection given by this and the following sections to persons obeying "the orders of magistrates and military officers is perhaps carried to an extent "not yet expressly decided: but see the language of Tindal, C. J., in R. v. "Pinney, 5 C & P, and Willes, J., in Keighley v. Bell, 4 F. & F. 763." And in the body of their report upon the Draft Code the Commissioners have the following general remarks in reference to the suppression of riots: "We would "direct special attention to the sections relating to the suppression of riots, "particularly to their suppression by the use of military force. We do not think "that these sections differ from what would probably be held to be the law if "cases should ever occur to raise the questions which they determine, but we "cannot say that every proposition has been expressly held to be law. We must "observe in regard to all these provisions that the law upon the different matters "to which they relate has never before, so far as we know, been reduced to an "explicit or systematic form."

42. 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.

43. 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 articles 83 and 84 *post* as to reading of Riot Act and dispersion of rioters.

44. Every one is *justified* in using such force as may be reasonably necessary in order to prevent the commission of any offence for which if committed, the offender might be arrested without warrant,(1) and the commission of which would be likely to cause immediate and serious injury to the person or property of any one; or in order to prevent any act being done which he, on reasonable grounds, believes would, if committed, amount to any of such offences.

It was always lawful for any one to use necessary force to prevent the commission of serious crimes; and resistance to the commission of an attempted

(1) See List of these offences under Article 26, *ante* p 19.

felony, accompanied with force or violence, might be carried to the extent of killing the would-be felon, if his purpose could not be otherwise frustrated. (1) By the above article, the general rule, allowing the use of necessary force to prevent crime, is made to include the prevention of any of the offences for which under the Code an arrest may be made without warrant.

The cases of preservation of the peace and prevention of crime are very closely connected with each other; and the prevention of crime is also closely connected with self-defence. For example, if a highway robber attack a peaceable citizen with murderous violence, the person so attacked has three different grounds upon which he may be justified in making resistance, even with deadly weapons; namely, First,—self-defence; Second,—the *right* of preventing an offence for which an arrest may be made without warrant; and, Third,—the right to arrest the offender in the act of committing such offence and on the ground that it is also an offence against the public peace. (2)

When homicide is committed in the prevention of a criminal act accompanied with violence, the ground upon which it is justifiable is that of necessity; and therefore the necessity must continue to the time of the killing, or it will not justify it. For, although the person upon whom a criminal attack with violence is made need not retreat, but may at once resist and even pursue his antagonist until he finds himself out of danger, still, the killing of the offender after he is properly secured and after the apprehension of danger has ceased would not be justifiable, but would be murder, unless the blood were still hot from the contest or pursuit, and then on account of the high provocation it might be held to be only manslaughter. (3)

45. Self defence against (1) unprovoked and (2) provoked assaults.—Every one unlawfully assaulted, not having provoked such assault, is *justified* in repelling force by force, if the force he uses is not meant to cause death or grievous bodily harm, and is no more than is necessary for the purpose of self-defence; and every one so assaulted is *justified*, though he causes death or grievous bodily harm, if he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purpose, and if he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

46. 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.

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(1) Handcock v. Baker, 2 Bos. & Pul. 265; 1 Russ. Cr., 5 Ed. 852; 1 Hale, 481-8, 547; Reg. v. Bull, 9 C. & P. 22; 4 Bl. Com. 180; 3 Inst. 55, 56; 1 East. P. C. 271; 1 Bish. New Cr. Law Com., ss. 849-851.

(2) Steph. Hist. Cr. Law, 14.

(3) 1 East., P. C., c. 5, s. 60, p. 293; 4 Bl. Com. 185; 1 Hale 485; 1 Russ, Cr., 5 Ed. 852.

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

ILLUSTRATIONS.

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

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

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

The force used by way of self-defence should be proportioned to and should not exceed what is necessary to avoid the attack which is being defended; and in order to justify the use of a weapon in self-defence, a person must, if he thereby kill or seriously injure his antagonist, shew conclusively that that mode of defending himself was really necessary to preserve his own life or avoid serious bodily harm, and that, before using it, he retreated as far as he could and had no other means left of successfully resisting or escaping. (1) In fact all force used by way of self-defence must in order to be justified or excused, as such, proceed from necessity; that is to say, it can only be justified when it is necessary for the avoidance or prevention of an offered injury; (2) and in no case can the force used be justified if the circumstances shew that the offered injury could be avoided without it, or if the force used be not for actual self-defence, but by way of retaliation, no matter what the provocation for such retaliation may be. For no provocation will, for example, render homicide justifiable or excuseable. The most that any provocation can do is to reduce homicide to manslaughter. If one man kill another suddenly, without any or indeed without considerable provocation, the law implies malice, and the homicide is murder. Thus if A in passing B's shop distort his mouth and laugh at B, and B kill him, it is murder. (3) Or, if A be passing along the street, and B, meeting him, (there being a convenient space between A and the wall), take the wall of him, and thereupon A, upon this slight provocation, kill B, this is murder (4) But if there be provocation such as tends to greatly excite a person's passion, the killing in the heat of such passion will be *manslaughter* only. (5) For instance, during a street row, a soldier ran hastily towards the combatants, when a woman cried out: "You will not murder the man, will you?" The soldier replied: "What "is that to you, you bitch?" Upon this the woman struck the soldier with an iron patten in the face, inflicting a severe wound and drawing much blood; and as she ran away the soldier pursuing her, stabbed her in the back and killed her. This was held to be only manslaughter, the smart of the man's wound and the effusion of blood being considered likely to keep his indignation

(1) Reg. v. Smith, 8 C. & P. 160; 1 Russ. Cr. 5 Ed. 846.
(2) Fost. 273, 275; 4 Bl. Com. 184.
(3) Brain's case, 1 Hale 455.
(4) 1 Hale, 455.
(5) Kel. 135; 1 Hale, 466; Fost. 290; Arch. Cr. Pl. & Ev. 20 Ed. 721. See also article 229 of the Code *post*.

boiling to the moment of the stabbing. (1) And, if a man find another in the act of adultery with his wife, and kill him or her, on the spot, this is only manslaughter, on account of a provocation so great that the law reasonably concludes it to be unbearable in the first transport of passion. (2) So, if a father see another in the act of committing an unnatural offence with his son, and smarting under this provocation instantly kill him, it is but manslaughter. (3)

There are authorities to the effect that mere words or gestures,—no matter how insulting or how expressive of contempt or reproach,—will not, without an actual assault, be sufficient to reduce homicide to manslaughter. (4) But Mr. Justice Blackburn, in refering to this doctrine, treated it as a *general rule*, which, under special circumstances, may have exceptions, as shewn by the following extract from his remarks in Rothwell's case :—" As a general rule of " law no provocation of words will reduce the crime of murder to that of " manslaughter ; but under special circumstances there may be such a provoca- " tion of words as will have that effect ; for instance, if the husband suddenly " hearing from his wife that she had committed adultery, and, he having no " idea of such a thing before, were thereupon to kill her, it might be man- " slaughter." (5) And in commenting on this, Russell expressly agrees with Mr. Justice Blackburn's view of the law as here stated (6). There seems to be no doubt that, if the words which have provoked a killing are threats to do seriously bodily harm and are accompanied by some act shewing an evident intention of immediately following them up by actual physical force and violence. they will in that case also be such a provocation as would reduce the killing to manslaughter. (7)

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

For although an assault with violence may reduce the offence of killing to manslaughter, when the party assailed, immediately, and in the heat of blood, resents the assault by killing his assailant, (8) it is not to be understood that the offence will be extenuated by every trifling provocation which, in point of law, may amount to an assault, nor even by an actual blow, in all cases ; (9) nor that the retaliation may consist of violent acts of resentment bearing no proportion to the provocation or insult given and proceeding rather from brutal malignity than from human frailty. All such acts of retaliation are simply barbarous ; and barbarity will often make malice. (10)

For instance, A & B quarrelled about some money that A had won from B. and which B wanted back. A would not give up the money ; so B struck him, and A knocked B down ; B got up, and A knocked him down again, and kicked him. A then put a rope round B's neck and after strangling him dragged his dead body into a ditch. A's acts amounted to murder and were so wilful and deliberate that nothing could justify them. (11) And where a wife scolded and chided her husband till he struck her with a pestle, so that she died, the husband was held guilty of murder, the pestle being a weapon likely to endanger life and the chiding being no provocation to extenuate the act to manslaughter. (12)

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(1) Stedman's case, Fost. 292.
(2) 1 Hale, 486 ; R, v. Kelly, 2 C. & K. 814 ; 1 Russ. Cr, 5 Ed. 687, 692.
(3) R. v. Fisher, 8 C. & P. 182. See article 229 of the Code *post.*
(4) Fost. 290.
(5) R. v. Rothwell, 12 Cox, C. C. 145 ; 1 Russ. Cr. 677.
(6) 1 Russ. Cr. 677 note (*a*). See par. 2, article 229 of the Code, *post.*
(7) Lord Morley's case, 1 Hale ; 1 East, P. C., c. 5, s. 20, p. 233.
(8) 4 Bl. Com. 191.
(9) Rex. v. Lynch, 5 C. & P. 324 ; 4 Bl. Com. 199 ; 1 Russ. Cr. 681.
(10) Keate's case, Comb. 408 ; 1 Russ. Cr. 678.
(11) Rex. v. Shaw, 6 C. & P. 372 ; 1 Russ. Cr. 681.
(12) Kel. 64 ; 1 Hale, 456 ; 1 Russ. Cr. 677.

In order to reduce a homicide, upon provocation from murder, to manslaughter it is essential in all cases that the killing should appear to have been done immediately upon the provocation being given; for if there be sufficient cooling time for passion to subside and reason to interpose before the killing, it will be deliberate revenge, not heat of blood, and will amount to murder; (1) it being presumed, in that case, that the offender meant (in the terms of article 227, *post*) to cause death, and was actuated by what, under the old law, was known as express malice. (2)

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

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

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

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

50. Every one who is in peaceable possession of any moveable property or thing, but neither claims right thereto nor acts under the authority of a person claiming right thereto, is neither *justified* nor *protected from criminal responsibility* for defending his possession against a person entitled by law to the possession of such property or thing.

51. Defence of dwelling House.—Every one who is in peaceable possession of a dwelling-house, and every one lawfully assisting him or acting by his authority, is *justified* in using such force as is necessary to prevent the forcible breaking and entering of such dwelling-

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

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

house, either by night or day, by any person with the intent to commit any indictable offence therein.

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

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

Breaking means *to break* any part of a building, or *to open*, by any means, any door, window, shutter, cellar-flap, or other thing intended to cover openings to the building or to give passage from one part of it to another; and an *entrance* is made as soon as any part of the body of the person entering or any part of any instrument used by him is within the building. (1)

While these two articles have reference to a breaking and entering with intent to commit an indictable offence, article 53 deals with the case of a mere trespasser.

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

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

ILLUSTRATIONS.

A a trespasser enters B's house and refuses to leave it. B is entitled to use all necessary force to remove A, but not to strike him. If, on B applying such necessary force, A resists, which is equivalent to an unprovoked assault, or if he otherwise actually assault B, B may defend himself, overcome A's resistance, and persist in using the necessary force to remove A from the house. (2)

A, on entering his own house, found B there and desired him to withdraw, but B refused to go. Upon this, words ensued between them, and A becoming excited proceeded to use force, and, by a kick which he gave B, caused his death. A was not justified in turning B out of the house by means of a kick, and was held guilty of manslaughter. (3)

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(1) See Article 407 *post*.
(2) 1 Hale P. C. 486; Burbridge Dig. Cr. L. 195; 3 Steph. Hist. Cr. L. 15.
(3) Wild's case, 2 Lew, 214

A and his servant B insisted on placing corn in C's barn, which she refused to allow A and B insisted and used force; a scuffle ensued, in which C received a blow on the breast, upon which she threw at A, a stone which killed him. It was held that, as A received the blow in an attempt to invade C's barn against her will, and as C had a right, in defending her barn, to employ such force as was reasonably necessary, for that purpose, she was not responsible for the unforeseen occurrence which happened in so doing (1).

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

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

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

55. Discipline of minors.—It is lawful for every parent, or person in the place of a parent, schoolmaster or master, to use force by way of correction towards any child, pupil or apprentice under his care, provided that such force is reasonable under the circumstances.

The doctrine embodied in this article is that a parent, guardian, schoolmaster or master may inflict upon a minor child, ward, pupil, or apprentice, under his care, such force by way of correction as amounts to *moderate* chastisement. But he must not go beyond this; if he does, he will be liable to be indicted for assault and battery, or,—if his excessive chastisement causes the child's death, —for culpable homicide (2). The right of a teacher to chastise his pupil cannot be greater than that of the parent over the child. And so where a schoolmaster, beat a scholar for two hours with a thick stick the beating was unlawful. (3) Nor can the teacher of a mere day scholar, living with the parents, usurp the parental function of chastising for faults committed at home. (4)

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

57. Surgical operations.—Every one is *protected from criminal responsibility* for performing with reasonable care and skill any surgical operation upon any person for his benefit, provided that

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(1) Hinchcliffes case, 1 Lew, 161; 1 Russ. Cr. 5 Ed. 687.

(2) 3 Greenl. Ev. s. 63; Rex, v. Cheeseman, 7 C. and P. 455; Rex v. Hazel, 1 Leach, 368; 1 East P. C. 236; Rex v. Conner 7 C. & P. 438, 1 Bish. New Cr Law Com. p. 531.

(3) Rex v. Hopley, 2 F. & J. 202.

(4) 1 Bish. New Cr Law Com. p. 535.

performing the operation was reasonable, having regard to the patient's state at the time, and to all the circumstances of the case.

See Article 212 *post*.

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

ILLUSTRATIONS

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

If A be suffering from a tumor or other serious malady, he has a right to allow B, a surgeon, to perform a surgical operation considered reasonable and necessary for the purpose of relieving or curing him; and if he happen to die under or in consequence of the operation, B will (under article 571) be free from criminal responsibility if he has used in the operation reasonable knowledge, care and skill, as required by article 212 *post*.

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

PART III.

PARTIES TO THE COMMISSION OF OFFENCES.

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

(*a.*) actually commits it; or

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

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

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

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

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

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

It will be seen here that the distinctons between principals of the first and second degree and between principals and accessories before the fact are done away with, and that all are expressly made principals or parties, to and equally guilty of an offence, who, (a) actually commit it, (b), who do or omit anything to help its commission, (c) who abet or assist at its commission, or (d) who counsel or procure its commission.

In reality, and for all practical purposes the distinctions between principals and accessories before the fact were removed years ago, and have since existed only in name. In England, accessories before the fact were placed on the same footing, in every respect, with principals, by the 24 and 25 Vict. c. 94; and in Canada the same thing was done by the R. S. C. chap. 145, which enacted that every principal in the second degree and every accessory before the fact to any felony should be tried and punished as a principal felon; that every one aiding, abetting, counselling or procuring the commission of any misdemeanor should be tried and punished as a principal offender; and that every one aiding, abetting, counselling or procuring the commission of any offence punishable summarily should also be punishable as a principal offender.

The Code, therefore drops these unnecessary nominal distinctions, and gives only two classes of persons as being, in regard to the degree of their guilt, parties to or implicated in a criminal offence, namely,

PRINCIPALS, AND ACCESSORIES AFTER THE FACT.

Principals.—A principal may be, the actual perpetrator of the act, that is, the one who, with his own hands or through an innocent agent, does the act itself; he may be one who, before the act is done, does or omits something to help its commission, he may be one who counsels or procures the doing of it, or who does it through the medium of a guilty agent: or he may be one who is present, aiding and abetting another in the doing of it.

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

ILLUSTRATIONS.

A purposely lays poison for B, who takes it, and dies from it, A, although absent when the poison is taken, is the actual perpetrator of the deed. (1).

A and B were hired to unload sacks of oats from a ship and convey them to C's warehouse, A bringing out the sacks of oats from the ship and putting them on B's carts, and B drawing the loads from the ship's side to the warehouse. B, when starting with one of his loads, called out, "It's all right," to A. who shortly afterwards,—while B was away with the load with which he had started,—went to another cart near the vessel, emptied into a nosebag some oats

(1) Fost. 349; 1 Russ. Cr. 5 Ed. 161; Burbridge Dig. Cr. Law 42; Vaux's case, 4 Co. 44; Bish. Cr. Law Com, s. 651.

from two sacks on the cart, and then placed the nosebag under the cart. When B returned to the vessel a few minutes later with the emply cart he took the nosebag from under the other cart where A had placed it, put it on his cart, and drove off with it, A then being on the vessel and within a few yards of B. Held, that as these circumstances shewed one transaction in which A and B both concurred and in which both were present at some part, though not at evey part of it, both were properly convicted as principals and actual prerpetrators of the larceny. (1)

To be the actual perpetrator of the act, by means of an innocent agent, is, for instance, where an offender, who may be absent when the act is done, uses, as an instrument to effect his purpose, a child under years of discretion, a mad man or other person of defective mental capacity, or any one excused from responsibility by ignorance of fact or other cause. (2)

ILLUSTRATIONS.

Where A induced B a child of nine to take money from his father's till, and give it to A, it was left to the jury to say whether B was acting unconsciously of guilt at the dictation and as the innocent agent of A (3).

A gives to B a note which he knows is forged, and asks him to get it cashed. If B gets it cashed, not knowing it to be forged, the innocent uttering by him is the guilty uttering of A, though A is absent when it is done (4).

If a person employed as an instrument is aware of the nature of the act but merely concurs in it for the purpose of detecting and punishing the person employing him, he is, in that case, also considered and treated as an innocent agent (5).

A person who before the commission of an offence does something to aid in its being committed may also be a principal without being present when it is actually committed or completed.

ILLUSTRATIONS.

A, a servant, let B into his master's house to steal therein his master's money. B continued inside until he committed the theft, but A left the house before the theft was actually committed. A was a party to the offence; (6) and would now be held a principal.

A, a servant, unlocks the door of the house that B may enter and steal therein, which he does about 20 minutes after A has left the house. A is a principal offender. (7)

A person who counsels or procures the commission of an offence, or who does it through the medium of a guilty agent is necessarily absent when the offence is actually committed; or, if present, he would be doing or aiding at the very act itself. It seems to be in the very nature of things that there should be no distinction drawn between the guilt of one who procures a crime to be done and that of the agent who does it for him; or, at least, the distinction, if any, should not be in favor of the procurer. It is only right that the procurer or any one

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(1) Reg. v Kelly, 2 C. and K. 379; 1 Russ Cr. 158.
(2) Fost. 349; 1 Bish. Cr. Law Com. s. 651.
(3) Reg. v. Manley: 1 Cox. C. C. 104; 1 Russ. Cr. 160; Burbridge Dig. Cr. Law, 43.
(4) Reg. v. Palmer & Hudson, 1 New Rep, 96.
(5) R. v. Bannen, 2 Mood. C. C. 309; 1 C. & K. 295.
(6) Reg. v. Tuckwell, C. & M. 215; 1 Russ. Cr. 158.
(7) Reg. v. Jeffries & Bryant, Gloucester Spr. Ass. 1848; Cresswell & Patterson, JJ., MSS., S. G., 3 Cox, C. C., 85; 1 Russ. Cr. 159.

who commits an offence by the agency of another should be treated as a principal, whether his agent or instrument be a guilty or an innocent one: for *qui facit per alium facit per se*,—what one causes to be done by another is regarded as done by himself. (1)

The procurement may be personal, that is, personal between the procurer and the doer; or it may be through the intervention of a third party; and it will be sufficient even though the employer merely direct his agent to procure some other person without naming him. (2) It may be *direct*,—by hire, counsel, or command, or by conspiracy; or it may be *indirect*,—by expressly evincing, (that is, evincing by some words or actions), a liking for, approbation of, or assent to another's criminal design of committing an offence. (3) Still, a mere *silent* acquiescence would not be sufficient. (4)

The procurement must be continuing; for if the procurer repent, and, before the offence is committed, actually countermand his order, and the person whom he has ordered counselled or procured persists in committing the offence in spite of the countermand, it seems that the original contriver will not be held responsible as a party to the offence. (5) But, query, would be not, by having counselled the commission of the crime be held (under article 64) guilty of an *attempt* to commit it, notwithstanding his subsequent repentance?

If a person order counsel or advise one crime and the person ordered counselled or advised *intentionally* commit another, as, for instance, if he be ordered to burn a house and instead of that he commit a theft, or if his instructions are to commit a crime against A, and instead of doing so he *purposely* commit the crime against B, the person so ordering will not be answerable. (6) But if it be merely *by mistake* that he commits the offence against B instead of A, in that case the person ordering would be responsible. (7) And it is clearly laid down by the above article, 62, that he who counsels or procures the commission of any offence is a party to it, although the offence itself be committed in a way different from that which was counselled, and he is a party to every offence which is committed in consequence of such counselling, and which he knew or ought to have known to be likely to be committed in consequence of such counselling; and therefore both by this article and by the common law he is liable for everything that ensues upon the execution of the unlawful act counselled or commanded.

ILLUSTRATIONS.

A commands B to beat C, and B beats him to such an extent that he dies. A is a party to the murder. (8)

A commands B to burn C's house, and in the burning, the house of D is burned also. A is a party to the offence of burning D's house. (9)

A hires B to kill C by means of poison; and instead of poisoning him B kills C by shooting him. A is a party to the murder. (10)

Soliciting as an attempt.—When a person with criminal intent solicits or advises another to commit an offence, which the other does *not* commit at all.

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(1) Broom's Leg. Max., 2 Ed. 643; Co. Lit. 258 a.
(2) Fost. 121, 125; R. v. Cooper, 5 C. & P. 535; 1 Bish. New Cr. L. Com s. 677.
(3) R. v. Cooper, 5 C. & P. 535.
(4) Reg. v. Atkinson, 11 Cox, C. C., 330; 1 Bish. New Cr. L. Com., s. 633.
(5) Arch. Cr. Pl. 11.
(6) 2 Hawk., P. C, c. 29, s. 21, 22.
(7) Fost. 370 et seq.; 2 Hawk., P. C., c. 29, s. 22; 1 Bish. New Cr. L. Com., s. 640.
(8) 4 Bl. Com. 37; 1 Hale, 617.
(9) R. v. Saunders, Plowd, 475.
(10) Fost. 369, 370.

the soliciting or advising in that case will constitute on the part of the would-be procurer an attempt to commit the offence solicited or advised by him. (1)

A person may be considered as a principal present aiding and abetting in the commission of an offence, without his presence being such a strict, actual, immediate presence as would make him an eye or ear witness of what is passing; it may be a constructive presence. (2) So that if a number of persons set out together, or in small parties, upon one common design, be it murder or any other offence, or for any other purpose of an unlawful nature in itself, and each takes the part assigned to him; some to commit the act, others to watch at proper distances and stations to prevent a surprise or to favor if need be the escape of those more immediately engaged; they are all, provided the act be committed, present at it, in the eye of the law; for the part taken by each man in his particular station tended to give countenance, encouragement and protection to the whole gang and to ensure the success of their common enterprise. (3) If, however, the original intention or purpose of persons assembling and setting out together be a lawful one and if their common purpose be prosecuted by lawful means, and opposition to them be made by others, and one of the opposing party is killed in the struggle, in that case the person actually killing may be guilty of murder or manslaughter, as circumstances may vary the case, but the persons engagod with him will not be involved in his guilt, unless they actually aided and abetted him in the fact. (4)

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

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

The evident basis of this offence is that to assist an offender to escape punishment is, in principle, an obstruction of public justice of the same nature as resisting a peace officer in making an arrest, or rescuing a prisoner under arrest, and other like offences. To be an accessory after the fact a man must be aware of the guilt of the person whom he harbors or assists. And one does not become an accessory after the fact by merely neglecting to inform the authorities that a crime has been committed, or by forbearing to arrest the offender. (5)

The test of an accessory after the fact seems to be that he renders the principal offender some active personal help to enable him to escape punishment, as, by furnishing him with money or food to support him in hiding, or by supplying him with a horse to enable him to fly from his pursuers, or a house or other shelter to conceal him in, or by using open force and violence to protect him, or by conveying instruments to an offender to enable him to break gaol, or by bribing the gaoler to let him escape. (6) Of course when a person actually rescues an offender from prison or from lawful custody, the rescuer is not only

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(1) Reg. v. Gregory, Law Rep. 1 C. C. 77; 10 Cox C. C. 459; 1 Bish. New Cr. L. Com., s.s. 767, 772*a*. See article 64, *post*.

(2) 1 Russ. Cr., 5 Ed. 157.

(3) Fost. 350; 2 Hawk, P. C., c. 29, s. 7, 8; Reg. v. Howell, 9 C. & P. 437.

(4) Fost. 354-5; 1 Russ. Cr. 163-4.

(5) 1 Hale, P. C. 618, 619.

(6) 1 Bish. New Cr. L. Com., p. 422; 4 Bl. Com. 38.

guilty of being an accessory after the fact to the other's offence, if he has actually committed one, but also of the substantive offence of rescue; and he may be indicted either way at the election of the prosecution. (1) But where the rescue is effected before the principal offender has been convicted, the prosecution would probably prefer to prosecute the rescuer on the substantive offence of rescue; for when a person is in prison or in lawful custody upon a criminal charge it is an offence to rescue him or to help him to break prison, whether the prisoner be guilty or not of the crime charged against him. (2)

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 intented *whether under the circumstances it was possible to commit such offence or not.*

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

An attempt is "an abortive or frustated effort:" (3) A bare intention to commit a criminal offence is not of itself punishable; but, in order to be so, there must be some act or acts amounting either to an *actual* or an *attempted* carrying out of the criminal intention. Thus, if A resolves in his own mind to shoot B, and openly avows it, he therely commits no criminal offence: (4) but when he does something in execution of his design, and, through being interrupted or through some unforeseen cause intervening, he falls short of the actual perpetration of the intended offence he is guilty of an attempt (5).

An attempt to commit a crime may be made by soliciting another to commit it. For, as, on the one hand, a person is guilty, as a principal offender, of an offence which he solicits, advices or incites another to commit, and which the other actually *does* commit, (6) so, on the other hand, when a person solicits advises or incites another to commit an offence which the other does *not* commit, the act of soliciting, advising or inciting amounts to an attempt to commit the offence in view (7). In other words, one who unsuccessfully solicits or advises the commission of an offence is guilty of an attempt to commit it; while one whose solicitation is successful in procuring the actual commission of an offence is a party to its commission. Thus, where one wrote to a school boy to meet him for the purpose of sodomy, but the boy, without even reading the letter, passed it to the school authorities, it was held that the offence of attempt by solicitation was complete (8). It is said that an act to constitute an attempt must be such as directly approximates to or is closely connected with the actual commission of the intended offence. (9) In the application of this principle some nice questions have arisen as to what acts, on the one hand, are preparation too

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(1) Rex v. Burridge, 3 P. Wms. 439, 483, 485, 493.

(2) Articles 165, 166, 167, *post*; Reg. v. Allan, Car. & M. 295; R. v. Haswell, Russ. & Ry. 458; 1 Bish. New Cr. L. Com., p. 423.

(3) Holloway v. Reg. 17 Q. B. 317; Broom's Com. L. 5 Ed. 856.

(4) See article 959, par. 2, *post*, as to right to compel persons using threats of bodily harm to furnish security to keep the peace.

(5) R. v Scofield, Cald. 397, 403; 1 East P. C. 58, 225; 1 Bish. New Cr. L. Com pp. 111, 113; 1 Russ. Cr. 5 Ed. 188; R. v. Connoly, 26 Q. B. (Ont.) 322; Clark Mag. Man. 2 Ed. 435.

(6) See article 61, ante p. 35.

(7) 2 Steph. Hist. Cr. L. 230; R. v. Higgins, 2 East, 5; R. v. Daniels, 1 Salk, 380: R. v. Collingwood, 3 Salk. 42; 2 L. R. 1116; Woolrych Cr. L. 1194; 1 Russ. Cr. 5 Ed. 189.

(8) Reg. v. Ransford, 13 Cox. C. C 9; 1 Bish New Cr. L. Com. p. 462.

(9) Harris Cr. L. 4 Ed. 16; Reg. v. Eagleton, Dears. C. C. 515; 1 Russ Cr. 5 Ed. 190; 2 Steph. Hist. Cr. L. 224.

remote to be an attempt, and what, on the other hand, are close enough to the offence to be an attempt; it being in many case very difficult,—some say, impossible,—to distinctly define the dividing line between *mere preparation* for an offence and an *actual attempt* to commit it (1). As an illustration the case is given of a man who, with intent to commit murder, walks to the place where he purposes to commit it. This act of walking to the place is not considered an act sufficient to constitute an attempt to murder (2). But if besides walking to the place, the man were, on arriving there to meet and fire a pistol shot at his intended victim, and fail to kill him, either by missing his aim altogether, or through the shot, though taking effect, not being fatal, he would undoubtedly be guilty of an attempt to murder. The mere act of buying a box of matches with the intention of using them to set a corn stack on fire is too remote to constitute an attempt to set the fire. (3). But where the prisoner had knelt down before a corn stack, and had lighted a match with the intention of setting the stack on fire; and then he blew out the light on observing that he was watched; it was held that this was an attempt to burn the stack. The accused had called at the prosecutor's house, and, on first being refused work and on afterwards being refused a shilling which he asked for, he became, violent and threatened to burn up the premises. He was then watched by the prosecutor and his servant and seen to go to a neighboring stack where he knelt down and struck a lucifer match, but discovering that he was watched he blew out the lighted match and went away. (4).

In another case A was charged with attempting to set fire to a dwelling-house, and B with inciting and hiring him to commit the offence. Under B's directions, A had arranged and placed pieces of blanket saturated with coal oil against the doors and sides of the house, had lighted a match, which he held in his fingers till it was burning well, and had then put the light down close to the saturated blanket with the intention of setting the house on fire; but just before the flame touched the blanket the light went out, and he threw the match away without making any further attempt. Held that the attempt was complete. (5)

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

There have been some decisions which have gone a long way towards treating preparation to commit a crime as an attempt to commit it. For instance, the procuring of dies for coining bad money has been treated as an attempt to coin bad money. (6)

It was formerly considered that an act done with intent to commit an offence was not an attempt unless done under circumstances rendering it possible to accomplish the object in view; (7) and so where in an English case A put his hand into B's pocked with intent to steal what was in it, and the pocket happened to be empty, it was held that A could not be convicted of an attempt to steal. (8) But this decision has recently been overruled by the English Court of Crown Cases Reserved, presided over by Lord Chief Justice Coleridge, who, in delivering judgment, said, in reference to the pickpocket case,—"This is a "decision with which we are not satisfied. Reg. v. Dodd proceeded upon the

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(1) Steph. Hist. Cr. L. 224. 226.

(2) Remarks of Jervis C. J. in Reg. v Roberts, 33 Eng. L. & Eq. 553; 25 L. J. M. C. 17.

(3) Remarks of Chief Baron Pollock in R. v. Taylor 1. F. and F. 512.

(4) R. v. Taylor, 1 F. & F. 511.

(5) Reg. v. Goodman, 22 U. C. C. P. 338.

(6) Reg. v. Roberts, Dears. 539; 2 Steph. Hist. Cr. L. 224. [See article 466, *post*, which makes it a substantive offence,—indictable and punishable with imprisonment for life,—to purchase or have possession of coining instruments.]

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

(8) Reg. v. Collins, L. & C. 471; 33 L. J. M. C. 177; Harris Cr. L. 4 Ed. 17.

" same view, that a person could not be convicted of an attempt to commit an " offence which he *could not actually commit*. We are of opinion that Reg. v. " Dodd is no longer law. It was decided on the authority of Reg. v. Collins " [the pickpocket case], " and that case in our opinion is no longer law." (1).

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

TITLE II.

OFFENCES AGAINST PUBLIC ORDER, INTERNAL AND EXTERNAL.

PART IV.

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

65. Treason.—Treason is—

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

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

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

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

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

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

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

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(1) Reg. v. Brown, 24 Q. B. D. 357, 359; 16 Cox C. C. 715.

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

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

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

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

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

2. Every one who commits treason is guilty of an indictable offence and liable to suffer death.

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

The ingredients set forth in the above article as constituting the crime of treason are, in effect, the same as those which constitute high treason according to section 75 of the English Draft Code, as revised by the Royal Commissioners; whose remarks thereon are as follows:

"Our definition of High Treason exactly follows the existing law with one or "two exceptions which we felt warranted in making. The existing law depends "upon the old statute of 25 Edward 3, St. 5, C. 2, and on the judicial construc- "tion put upon that act. It is well explained in the opinion delivered by the "late Mr. Justice Willes in Mulcahy v. R., (L. R. 3 H. of L. 318). It has been "thought better to make the act of killing or wounding the Sovereign in itself "an act of treason, instead of adopting the artifical construction by which "cutting off the head of Charles the First was not treason in itself but was an "overt act evidencing the compassing of his death, which was treason within "the statute of Edward 3. And we have also thought it right to make conspiring "to levy war against the Sovereign in itself treason, instead of evidence of "compassing the Sovereign's death. It would in the present day be absurd to "re-enact the provisions which make it high treason to kill the Lord Chancellor "or a Judge of the Superior Courts in the discharge of his duties. The ordinary "law as to murder affords sufficient protection."

The principal heads of treason as contained in the statute of Edward 3 are (*a*) imagining or compassing the king's death, (*b*) levying war against the king, and (*c*) adhering to the king's enemies; (3) there being no *express* provision for any act of violence, towards the king's person, which did not display an intention to kill him, and nothing about attempts to imprison or depose the king, conspiracies or attempts to levy war, or disturbances however violent which did not

(1) See article 68, *post*. 46, for special provisions against levying war within Canada.

(2) Broom's Com. L. 5 Ed. 877, 878.

(3) 2 Steph. Hist. Cr. L. 243, 249.

reach the point of levying war; although there was a proviso (afterwards repealed by 1 Hen. IV. C. 10), that Parliament in its judicial capacity might upon the conviction of any person for any political offence hold that it amounted to high treason, though not specified in the act (1).

After the statute of Edward 3 many acts were passed, from time to time, (and especially during the period between the beginning of the Reformation and the end of the Tudor line), for the purpose of adding new treasons; but nearly all these acts were either *temporary* or have in one way or another long since expired; and they exercised little or no *permanent* influence on the law of treason, as contained in the old statute, with the wide constructions placed upon its provisions by learned judges and commentators, whose interpretations have received, in later legislation, (36 Geo. 3, c. 6, and 11 and 12 Vic. c. 12), full statutory recognition and authority (2).

The statute of Edward 3, taken literally, was too narrow to afford complete protection to the king's person, power and authority; but the judges, in their decisions, and various writers, in their comments upon the subject, held "that "to imagine the king's death means to intend anything whatever which under "any circumstances may possibly have a tendency, however remote, to expose "the king to personal danger or to the forcible deprivation of any part of the "authority incidental to his office (3)."

The mere intention of compassing the king's death seems to have constituted the substantive offence or *corpus delicti* in this particular kind of treason; thus shewing an apparent exception to the general doctrine that a person's bare intention is not punishable. But, although an overt act was not essential to the abstract crime, it was always held essential to the offender's conviction. The compassing or imagining, (that is, the mind's operation in willing or intending), the death was considered as the treason, and the overt acts were looked upon as the means employed for executing the offender's traitorous purpose. In other words, it was the intention itself that was looked upon as the crime; but in order to warrant a conviction, it was necessary to make proof of the manifestation of the intention by some overt act tending towards the accomplishment of the criminal object. And so it was held that, where conspirators met and consulted together how to kill the king, it was an overt act of compassing his death, even although they did not then resolve upon any scheme for that purpose. And all means made use of, either by persuasion or command, to incite or encourage others to commit the fact or join in the attempt to commit it were held to be overt acts of compassing the king's death; and any person who but assented to any overtures for that purpose was involved in the same guilt. (4)

Mere words of themselves were not regarded as an overt act of treason; for in Pine's case it was held that his having spoken of Charles I as *unwise*, and as *not fit to be king*, was not treason, although very wicked; and that unless it were by some particular statute no words alone, would be treason. (5) But words were sometimes relied on to shew the meaning of an act. As, where C, being abroad, said: "I will kill the king of England if I can come at him," and the indictment, after setting forth these words, charged that C went into England for the purpose indicated by the words, it was held that C might, on proof of these facts, be convicted of treason; for the traitorous intention evinced by the words uttered converted an action innocent in itself into an overt act of treason. The deliberate act of writing treasonable words was also considered an overt act, if the writing were published; for *scribere est agere*. (6). But even in that case it was not the bare words themselves that were considered the

(1) 2 Steph. Hist. Cr. L. 250, 253.
(2) 2 Steph. Hist. Cr. L. 255, 262, 279.
(3) 2 Steph. Hist. Cr. L. 263, 268.
(4) Broom's Com. Law, 5 Ed. 880, 881.
(5) 2 Steph. Hist. Cr. L. 308.
(6) 3 Inst. 14, 1 Hale P. C. 112: 4 Bl. Com. 80; Broom's Com. L. 883.

treason; and the preponderance of authority favored the rule that writings not published did not constitute an act of treason. (1)

The wide construction placed upon the language of the Statute of Treasons is shewn by the words of Coke, who, in referring to the cases of Lord Cobham and the Earl of Essex, says: "He that declareth by overt act to depose the king "does a sufficient overt act to prove that he compasseth and imagineth the "death of the king. And so it is to imprison the king or to take the king into "his power and to manifest the same by some overt act. And if a subject "conspire with a foreign prince to invade the realm by open hostility, and "prepare for the same by some overt act, this is a sufficient overt act for the "death of the king." (2) Hale coincides with Coke and adds that, "to levy war "against the king directly is an overt act of compassing the king's death, and "that a conspiracy to levy such a war is an overt act to prove it." (3) Foster following in the same strain, says: "The care the law hath taken for the per-"sonal safety of the king is extended to everything not fully and deliberately "done or attempted whereby his life *may* be endangered; and therefore the "entering into measures for deposing or imprisoning him or to get his person "into the power of conspirators, are overt acts of treason within this branch of "the statute; for experience hath shewn that between the prisons and the "graves of princes the distance is very small. Offences which are not so "personal as those already mentioned have been with great propriety brought "within the same rule, as having a tendency, though not so immediate, to the "same fatal end; and therefore the entering into measures in concert with "foreigners and others in order to an invasion of the kingdom, or going into a "foreign country, or even purposing to go thither to that end, and taking any "steps in order thereto, are overt acts of compassing the king's death." (4) Foster adds that a "treasonable correspondence with the enemy" is an act of compassing the king's death; and in support of this he refers to Lord Preston's case, (5) in which it was held that taking *a boat* at Surrey Stairs in Middlesex to ge *on board* a ship in Kent, for the purpose of conveying to Louis XIV a number of papers informing him of the naval and military condition of England and to so help him to invade England and depose William and Mary, was an overt act of treason by compassing and imagining the death of William and Mary. (6) A wide construction was also put upon the expression "adhering to the king's enemies"; its meaning being held to include any assistance given to aliens in open hostility against the king,—as, by surrendering to them a castle of the king's for reward, or selling them arms, etc., or cruising in a ship with enemies to the intent to destroy the king's subjects. (7)

With regard to "levying war" Sir James F. Stephen says: "The difference "between the commonest unlawful assembly and a civil war is one of degree, "and no definite line can be drawn at which riot ends and war begins. There "has been a double current of authority on this point from the date of the 25 "Edw. 3 to our own days. On the one hand the statute declares, and the com-"mentators have been careful to insist on the declaration, that in order to be "treason the war levied must be against the king. No amount of violence, "however great, and with whatever circumstances of a warlike kind it may be "attended, will make an attack by one subject on another high treason. On the "other hand any amount of violence, however insignificant, directed against the "king will be high treason, and as soon as violence has any political object "it is impossible to say that it is not directed against the king, in the sense of "being armed opposition to the lawful exercise of his power." (8)

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(1) Algernon Sidney's case, 9 How. St. Tr. 818; Broom's Com. L. 883.
(2) 3 Inst. 6, 12, 14; 2 Steph. Hist. Cr. L. 266.
(3) 1 Hale P. C. 110; 2 Steph. Hist. Cr. L. 266.
(4) Fost. 195; 2 Steph. Hist. Cr. L. 267, 8.
(5) Fost. 197.
(6) 12 State Trials, 646; 2 Steph. Hist. Cr. L. 267; Broom's Com. Law 882.
(7) Hawk. P. C. s.s. 23-28; 2 Bish. New Cr. L. Com. s 1212.
(8) 2 Steph. Hist. Cr. L. 268. For a full and interesting account of the law of treason see Stephen's History of the Crim. Law of England, 2nd vol. pp. 241-297.

A levying of war amounting to treason appears to consist of two elements,—(1) the intent existing in the mind of the offender either forcibly, to overthrow the government or to compel it through fear to yield something to which it would not otherwise assent; and (2) some overt act in the nature of war or of preparation for or threatening it (1).

It may perhaps be safe to say that when open force and violence, however extensive or serious, is not such as directly or indirectly attacks the sovereign or the government or their power and authority, or is not such as tends in some way to forcibly overthrow, coerce, or intimidate them or either of them, it will not be treason; and, although exceptional cases may arise in which the line of division between a riot and treason by levying war may not be distinct, it should not, as a general rule, be a difficult matter,—under the law as expressed in the present Title,—to distinguish between circumstances amounting to levying war, under articles 65 and 68, and the riotous offences dealt with,—according to their differences of extent and gravity,—under articles 80, 83, 84, 85 and 86.

Every prosecution for treason, (except treason by killing Her Majesty, or where the overt act alleged is an attempt to injure the person of Her Majesty), must be commenced within three years from the time of the commission of the offence; and no person is to be prosecuted under the provisions of article 65 or of article 69 for any overt act of treason expressed in or declared by open and advised speaking, unless information of such overt act and of the words by which the same was expressed or declared is given upon oath to a justice within six days after the words are spoken and a warrant for the offender's apprehension issued within ten days after such information is given (2).

One witness is not sufficient unless corroborated. (Article 684). See also special provisions, as to trial, in Art. 658.

66. Treasonable conspiracy.—In every case in which it is treason to conspire with any person for any purpose, the act of so conspiring, and every overt act of any such conspiracy, is an overt act of treason.

67. Accessories after the fact to treason.—Every one is guilty of an indictable offence and liable to two years' imprisonment who—

(*a.*) becomes an accessory after the fact to treason; or

(*b.*) knowing that any person is about to commit treason does not with all reasonable despatch, give information thereof to a justice of the peace, or use other reasonable endeavours to prevent the commission of the same.

By sec. 78 of the English Draft Code, the punishment of an accessory after the fact to high treason is penal servitude for life (3).

68. Levying war.(4)—Every subject or citizen of any foreign state or country at peace with Her Majesty, who—

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

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

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

Every subject of Her Majesty within Canada who—

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(1) 2 Bish. New Cr. L. Com. s. 1229.

(2) See article, 551, *post*.

(3) As to punishments of accessories after the fact in cases not otherwise expressly provided for, see articles 531 and 532 *post*.

(4) See comments under article 65, *ante* p. 45.

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

(*e.*) enters Canada in company with any such subjects or citizens with intent to levy war against Her Majesty, or to commit any such offence therein ; or

(*f.*) with intent to aid and assist, joins himself to any person who has entered Canada with intent to levy war against Her Majesty, or to commit any such offence therein—is guilty of an indictable offence and liable to suffer death. R.S.C., c. 146, ss. 6 and 7.

Persons offending against the provisions of this article may be tried and punished either by any Superior Court of criminal jurisdiction or by a Militia Court Martial. (1)

69. Treasonable offences. (2)—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 Her Majesty from the style, honour and royal name of the Imperial Crown of the United Kingdom of Great Britain and Ireland, or of any other of Her Majesty's dominions or countries ;

(*b.*) an intention to levy war against Her Majesty within any part of the United Kingdom, or of Canada, in order by force or constraint to compel her to change her measures or counsels, or in order to put any force or constraint upon or in order to intimidate or overawe both Houses or either House of Parliament of the United Kingdom or of Canada ;

(*c.*) an intention to move or stir any foreigner or stranger with force to invade the said United Kingdom, or Canada, or any other of Her Majesty's dominions or countries under the authority of Her Majesty. R.S.C., c. 146, s. 3.

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.C.S., c. 146, s. 4.

71. Assaults on the Queen.—Every one is guilty of an indictable offence and liable to seven years' imprisonment, and to be whipped once, twice or thrice as the court directs, who—

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(1) See articles 538 and 540, *post*, and secs. 6 and 7 R.S.C. c. 146, (unrepealed), in appendix, *post*.

(2) See article 551 sub-sec. 2, *post*, which requires that, in prosecutions under articles 65 and 69 for any overt act of treason expressed in or declared by open and advised speaking, information of the words used shall be given on oath to a justice within six days after the words are spoken, and that a warrant for the offender's apprehension shall be issued within ten days after such information is given.

(*a.*) wilfully produces, or has near Her Majesty, any arm or destructive or dangerous thing with intent to use the same to injure the person of, or to alarm Her Majesty ; or

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

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

(ii.) discharge at or near Her Majesty any loaded arm ;

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

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

(v.) throws anything at or upon Her Majesty ; or

(*c.*) attempts to do any of the things specified in paragraph (*b*) of this section.

72. Inciting to mutiny.—Every one is guilty of an indictable offence and liable to imprisonment for life who, *for any traitorous or mutinous purpose*, endeavours to seduce any person serving in Her Majesty's forces by sea or land from his duty and allegiance to Her Majesty, or to incite or stir up any such person to commit any *traitorous* or *mutinous* practice.

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

(*a.*) by words or with money, or by any other means whatsoever, directly or indirectly persuades or procures, or goes about or endeavours to persuade, prevail on or procure, any such seaman or soldier to desert from or leave Her Majesty's military or naval service ; or

(*b.*) conceals, receives or assists any deserter from Her Majesty's military or naval service, knowing him to be such deserter.

2. The offender may be prosecuted by indictment, or summarily before two justices of the peace. In the former case he is liable to fine and imprisonment in the discretion of the court, and in the latter to a penalty not exceeding two hundred dollars, and not less than eighty dollars and costs, and in default of payment to imprisonment for any term not exceeding six months. R.S.C., c. 169, ss 1 and 4.

This article provides that an offender may be prosecuted either by indictment or summarily, and it specifies the penalty to be incurred on a summary conviction; but in the case of a conviction upon indictment, although it enacts that the offender shall be liable to fine and imprisonment in the discretion of the court, it does not specify the amount of the fine nor the length of the imprisonment. Article 951, however, provides that a person convicted of an indictable offence for which no punishment is specially provided shall be liable to five years imprisonment (1).

Section 9, R. S. C. chap. 169, (unrepealed), provides that one moiety of the amount of any penalty recovered under this article shall go to the prosecutor and the other moiety to the crown (2).

Any one reasonably suspected of being a deserter from Her Majesty's service

(1) See *post.*
(2) See appendix, *post.*

may be arrested and brought before a justice of the peace and held till claimed by the military or naval authorities (1).

74. Resisting execution of warrant for arrest of deserters.—Every one who resists the execution of any warrant authorising the breaking open of any building to search for any deserter from Her Majesty's military or naval service is guilty of an offence and liable, on summary conviction before two justices of the peace, to a penalty of eighty dollars. R.S.C., c. 169, s. 7.

No one is entitled to break open any building to search for a deserter without having obtained a warrant for that purpose from a justice of the peace (2).

75. Enticing militiamen or 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 aid or assists in his rescue. R.S.C., c. 41, s. 109 ; 52 V., c. 25, s. 4.

76. Obtaining and communicating official information.—In the two following sections, unless the context otherwise requires—

(*a.*) Any reference to a place belonging to Her Majesty includes a place belonging to any department of the Government of the United Kingdom, or of the Government of Canada, or of any province, whether the place is or is not actually vested in Her Majesty ;

(*b.*) Expressions referring to communications include any communication, whether in whole or in part, and whether the document, sketch, plan, model or information itself or the substance or effect thereof only be communicated ;

(*c.*) The expression "document" includes part of a document ;

(*d.*) The expression "model" includes design, pattern and specimen ;

(*e.*) The expression "sketch" includes any photograph or other mode of expression of any place or thing ,

(*f.*) The expression "office under Her Majesty," includes any office or employment in or under any department of the Government of the United Kingdom, or of the Government of Canada or of any province. 53 V., c. 10, s. 5.

77. Every one is guilty of an indictable offence and liable to imprisonment for one year, or to a fine not exceeding one hundred dollars, or to both imprisonment and fine, who—

(*a.*) for the purpose of wrongfully obtaining information—

(1) See article, 561, *post.*
(2) See article 561, *post.*

(i.) enters or is in any part of a place in Canada belonging to Her Majesty, being a fortress, arsenal, factory, dockyard, camp, ship, office or other like place, in which part he is not entitled to be; or

(ii.) when lawfully or unlawfully in any such place as aforesaid either obtains any document, sketch, plan, model or knowledge of anything which he is not entitled to obtain, or takes without lawful authority any sketch or plan; or

(iii.) when outside any fortress, arsenal, factory, dockyard or camp in Canada, belonging to Her Majesty, takes, or attempts to take, without authority given by or on behalf of Her Majesty, any sketch or plan of that fortress, arsenal, factory, dockyard or camp; or

(*b.*) knowingly having possession of or control over any such document, sketch, plan, model, or knowledge as has been obtained or taken by means of any act which constitutes an offence against this and the following section, at any time wilfully and without lawful authority communicates or attempts to communicate the same to any person to whom the same ought not, in the interest of the state, to be communicated at the time; or

(*c.*) after having been entrusted in confidence by some officer under Her Majesty with any document, sketch, plan, model or information relating to any such place as aforesaid, or to the naval or military affairs of Her Majesty, wilfully, and in breach of such confidence, communicates the same when, in the interests of the state it ought not to be communicated; or

(*d.*) having possession of any document relating to any fortress, arsenal, factory, dockyard, camp, ship, office or other like place belonging to Her Majesty, or to the naval or military affairs of Her Majesty, in whatever manner the same has been obtained or taken, at any time wilfully communicates the same to any person to whom he knows the same ought not, in the 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 entrusted to him as aforesaid, or communicates the same to any agent of a foreign state, is guilty of an indictable offence and liable to imprisonment for life. 53 V., c. 10, s. 1.

78. Every one who, by means of his holding or having held an office under Her Majesty, has lawfully or unlawfully, either obtained possession of or control over any document, sketch, plan or model, or acquired any information, and at any time corruptly, or contrary to his official duty, communicates or attempts to communicate such document, sketch, plan, model or information to any person to whom the same ought not, in the interests of the state, or otherwise in the public interest, to be communicated at that time, is guilty of an indictable offence and liable—

(*a.*) if the communication was made, or attempted to be made, to a foreign state, to imprisonment for life; and

(*b.*) in any other case to imprisonment for one year, or to a fine not exceeding one hundred dollars, or to both imprisonment and fine.

2. This section shall apply to a person holding a contract with Her Majesty, or with any department of the Government of the United Kingdom, or of the Government of Canada, or of any province, or with the holder of any office under Her Majesty as such holder, where such contract involves an obligation of secrecy, and to any person employed by any person or body of persons holding such a contract who is under a like obligation of secrecy, as if the person holding the contract, and the person so employed, were respectively holders of an office under Her Majesty. 53 V., c. 10, s. 2.

No prosecution for any offence against articles 77 and 78 can be commenced without the consent of the *Attorney-General* or of the Attorney General of Canada (1).

For the meaning of the expression "*Attorney General*" see article 3 (*b*), *ante* p. 2.

See Art. 614 as to requisites of indictments under this part IV.

PART V.

UNLAWFUL ASSEMBLIES, RIOTS, BREACHES OF THE PEACE.

79. Unlawful assembly.—An unlawful assembly is an assembly of three or more persons who, with intent to carry out any common purpose, assemble in such a manner or so conduct themselves when assembled as to cause persons in the neighbourhood of such assembly to fear, on reasonable grounds, that the persons so assembled will disturb the peace tumultuously, or will by such assembly needlessly and without any reasonable occasion provoke other persons to disturb the peace tumultuously.

2. Persons lawfully assembled may become an unlawful assembly if they conduct themselves with a common purpose in such a manner as would have made their assembling unlawful if they had assembled in that manner for that purpose.

3. An assembly of three or more persons for the purpose of protecting the house of any one in their number against persons threatening to break and enter such house in order to commit any indictable offence therein is not unlawful.

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

The above definition of an unlawful assembly is a little different in its wording from that of section 11, R. S. C. chap. 147 (repealed); (2) but the two articles,

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(1) See article 543, *post*.
(2) See *ante*.

(79 and 80), are in exactly the same words as sections 84 and 85 of the English Draft Code. The remarks of the Royal Commissioners upon their definition of an unlawful assembly are as follows: "The earliest definition of an unlawful "assembly is in the Year Book 21 H. 7, 39. It would seem from it that the law "was first adopted at a time when it was the practice for the gentry, who were "on bad terms with each other, to go to market at the head of bands of armed "retainers. It is obvious that no civilized government could permit this "practice, the consequence of which was, at the time, that the assembled bands "would probably fight, and certainly make peaceable people fear that they "would fight. It was whilst the state of society was such as to render this a "prevailing mischief that the earlier cases were decided; and consequently the "duty of not provoking a breach of the peace has sometimes been so strongly "laid down as almost to make it seem as if it was unlawful to take means to "resist those who came to commit crimes. We have endeavored in section 84 "to enunciate the principles of the common law, although in declaring that an "assembly may be unlawful if it causes persons in the neighborhood to fear "that it will needlessly and without reasonable occasion provoke others to "disturb the peace tumultuously, we are declaring that which has not as yet been "specifically decided in any particular case. The clause as to the defence of a "man's house has been inserted because of a doubt expressed on the subject."

81. Every member of an unlawful assembly is guilty of an indictable offence and liable to one year's imprisonment. R.S.C., c. 147, s. 11.

82. Every rioter is guilty of an indictable offence and liable to two year's imprisonment with hard labour. R.S.C., c. 148, s. 13.

These articles reduce the punishments inflicted under the R.S.C., c. 147; which were two years imprisonment for unlawfully assembling and four years for rioting.

83. Reading the riot act.—It is the duty of every sheriff, deputy sheriff, mayor or other head officer, and justice of the peace, of any county, city or town, who has notice, that there are within his jurisdiction persons to the number of twelve or more unlawfully, riotously and tumultuously assembled together to the disturbance of the public peace, to resort to the place where such unlawful, riotous and tumultuous assembly is, and among the rioters, or as near to them as he can safely come, with a loud voice to command or cause to be commanded silence, and after that openly and with loud voice to make or cause to be made a proclamation in these words or to the like effect:—

"Our Sovereign Lady the Queeen charges and commands all persons being assembled immediately to disperse aud peaceably to depart to their habitations or to their lawful business, upon the pain of being guilty of an offence on conviction of which they may be sentenced to imprisonment for life.

"GOD SAVE THE QUEEN."

2. All persons are guilty of an indictable offence and liable to imprisonment for life who—

(*a.*) with force and arms wilfully oppose, hinder or hurt any person who begins or is about to make the said proclamation, whereby such proclamation is not made; or

(*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.

84. If the persons so unlawfully, riotously and tumultuously assembled together as mentioned in the next preceding section, or twelve or more of them, continue together, and do not disperse themselves, for the space of *thirty minutes* after the proclamation is made or after such hindrance as aforesaid, it is the duty of every such sheriff, justice and other officer, and of all persons required by them to assist, to cause such persons to be apprehended and carried before a justice of the peace ; and if any of the persons so assembled is killed or hurt in the 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.

These two articles are the same in effect as sections 88 and 89 of the English Draft Code. They are also similar to secs. 1, 2, and 3 of the R. S. C. chap. 147, (repealed) with this exception that the time within which the assembled persons are to disperse after the reading of the proclamation is reduced to thirty minutes ; the delay fixed by the old law being one hour.

The duty of a magistrate in regard to the quelling of a riot is fully explained by Littledale J. in Pinney's Case.

Pinney was the mayor of Bristol, and was prosecuted in 1832 on a charge of having neglected as chief magistrate of the city, to take proper measures for the suppression of some serious riots, which took place in Bristol in the previous year, in which many persons were killed and injured and many public buildings, including the gaol, the mansion house and the custom house, were destroyed before the mob were stopped by the military. Mr. Justice Littledale in the course of his charge to the jury said, in reference to the duties of magistrates. "A person whether a magistrate or a peace officer is in a difficult situation. If "by his acts he causes death he is liable to be indicted for murder or manslaughter, and if he does not act he is liable to an indictment on an information "for neglect. He is therefore bound to hit the precise line of duty ; and how "difficult it is to hit that precise line will be matter for your consideration ; but "that, difficult as it may be, he is bound to do. Whether a man has sought a "public situation, as is often the case of mayors and magistrates, or whether "as a peace officer he has been compelled to take the office that he holds, the "same rule applies ; and if persons were not compelled to act according to law "there would be an end of society ; but still you must be satisfied that the "defendant has been clearly guilty of neglect before you return a verdict "against him." (1)

No prosecution for any offence against article 83 can be commenced after the expiration of one year from its commission (2).

85. Riotous destruction of, or damage to buildings.—All persons are guilty of an indictable offence and liable to imprisonment for life who, being riotously and tumultuously assembled together to the disturbance of the public peace, unlawfully and with force *demolish or pull down, or begin to demolish or pull down,* any building, or any machinery, whether fixed or moveable, or any erection used in farming land, or in carrying on any trade or manufacture, or any

(1) Rex. v. Pinney, 5 C. and P. 254-261 : Brooms Com. L. 891.
(2) See article 551 (*c*), *post.*

erection or structure used in conducting the business of any mine, or any bridge, waggon-way or track for conveying minerals from any mine. R.S.C., c. 147, s. 9.

86. 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.

The second paragraph of article 86 is an addition to the law as contained in sec. 10, R. S. C. c. 147. The Royal Commissioners, in a note to a similar addition made in the English Draft Code, say that it "removes what is at least a doubt;" and they make a reference to the cases of Langford and Casey.

In Langford's case,—while it was held that it was a sufficient demolishing of a house if it were so far demolished that it was no longer a house, there being only a chimney left standing, and that if any *one* of Her Majesty's subjects were terrified it was a sufficient terror and alarm to substantiate that part of the charge of riot, — it was also held that if persons riotously assembled and demolished a house really believing that it is the property of one of them, and acted *bona fide* in the assertion of a supposed right it would not be a felonious demolition, although there would be a riot. (1).

In Casey's case the prisoners were charged with having unlawfully and riotously assembled and with force demolished and pulled down a house and scattered a hay rick *contra pacem* ; and it was held that upon the hypothesis that the prisoners had demolished the house not feloniously, but in the assertion of a supposed right the indictment could be sustained as for a misdemeanor at common law, that is, for the riot with the statement of the demolition of the house as an aggravation. (2)

By paragraph 2 of the above article 86 it will be seen that persons who riotously destroy or damage a building cannot now reduce their offence to a mere riot, on the plea that they acted in the assertion of a right which they believed they had, unless they really had such a right. The effect of the law as it now stands seems, therefore, to be that, if the offenders or any of them actually have a right to the building, they will only be guilty of the riot; but, if they have not such right although they believe they have, they will be guilty of the higher offence of riotous destruction or riotous damage, as the case may be.

87. **Unlawful drilling.**—The Governor in Council is authorised 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

(1) Reg. v. Langford and others, Carr. and Marsh, 602.
(2) R. v. Casey, 8 Irish Rep. Com. Law, 408.

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.

88. Every one is guilty of an indictable offence and liable to two years' imprisonment who, without lawful authority, attends, or is present at, any such assembly as in the last preceding section mentioned, for the purpose of being, or who at any such assembly is, without lawful authority and in contravention of such prohibition or proclamation trained or drilled to the use of arms or the practice of military exercises or evolutions. R.S.C., c. 147, s. 6.

These two articles modify the law as contained in secs. 4, 5, and 6 R. S. C., chap. 147 (now repealed); so that drilling will only be unlawful during the currency of and in so far as any such drilling may contravene any proclamation which the Governor in Council may from time to time publish against drilling, either generally or specially, according to the terms of the proclamation,

No prosecution for any offence against either of these articles can be commenced after the expiration of six months from its commission. (1)

89. Forcible entry and detainer.—Forcible entry is where a person whether entitled or not, enters in a manner likely to cause a breach of the peace, or reasonable apprehension thereof, on land then in actual and peaceable possession of another.

2. Forcible detainer is where a person in actual possession of land, without colour of right, detains it in a manner likely to cause a breach of the peace, or reasonable apprehension thereof, against a person entitled by law to the possession thereof.

3. What amounts to actual possession or colour of right is a question of law.

4. Every one who forcibly enters or forcibly detains land is guilty of an indictable offence and liable to one year's imprisonment.

This article is in exactly the same terms as sec. 95 of the English Draft Code; and the Royal Commissioners in their report say that it is a correct statement of the existing law.

In ancient times violent acts were frequently committed in taking possession of property, sometimes by those who were really the owners and sometimes by those who were not. (2) To meet the mischief, special statutes were passed, (in the reigns of Ric. II, Hen. VIII & Elizabeth), giving extraordinary powers to magistrates by authorising any justice of the peace upon the happening of any forcible entry into or any forcible detainer of lands to take sufficient force of the county to the place where the offence was committed and there record it upon

(1) See article 551 (*d*), *post.*

(2) Rem. of Lord Denman in R. v. Harland, 8 Ad. & E. 828.

his own view, as in the case of a riot, and to thereupon commit the offender to gaol till he should "make fine and ransom to the king." The justice, moreover, was empowered to summon a jury to try the forcible entry or detainer complained of, and if the fact of the forcible entry or detainer were found by the jury, restitution of possession might be made without any enquiry being instituted into the merits of the right of ownership. The same object could likewise be effected by means of indictment at the assizes; in which case it was discretionary with the judge of assize,—upon the finding of the bill by the grand jury,—to grant, upon grounds shewn by affidavit, a warrant of restitution. The proceedings under these statutes regarding forcible entry and detainer have thus been said to furnish "the only instance known to the law of England in "which a party may be turned out of possession by *ex parte* steps taken. (1)

90. Affray.—An affray is the act of fighting in any public street or highway, or fighting to the alarm of the public in any other place to which the public have access.

2. Every one who takes part in an affray is guilty of an indictable offence and liable to one year's imprisonment *with hard labour*. R. S. C., c. 147, s. 14.

This article effects a change by making an affray an indictable offence punishable by one year's imprisonment with hard labor, instead of being a summary offence punishable by three months' imprisonment, as it was under sec. 14, R. S. C., c. 147.

The essence of this offence is its tendency to alarm people at or near the scene of the fight. It is not necessary that actual terror should exist; but it will be inferred by the law from the fact of the fighting taking place in a public street or highway or in any other place accessible to the public.

Like an assault, an affray may be aggravated in its circumstances and become an element in some higher crime, as by developing into a riot, or by serious bodily injuries being inflicted or actual loss of life occasioned in the course of the fight.

91. Challenging to fight a duel.—Every one is guilty of an indictable offence and liable to three years imprisonment who challenges or endeavours by any means to provoke any person to fight a duel, or endeavours to provoke any person to challenge any other person so to do.

A duel is where two persons fight with deadly weapons and by previous mutual agreement. If in such a fight one of the combatants kill the other he will be guilty of murder; and the seconds of both combatants and all present giving countenance to the transaction (including even the surgeon), will also be equally guilty of that offence. (2)

92. Prize fights.—In sections ninety-three to ninety-seven inclusive the expression "prize-fight" means an encounter or fight with fists or hands, between two persons who have met for such purpose by previous arrangement made by or for them. R. S. C., c. 153 s. 1.

93. 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

(1) Broom's Com. L. 892–894.

(2) Reg. v. Young, 8 C. & P. 644; Reg. v. Barronet, Dears. 53; Reg. v. Cuddy, 1 Car & K. 210; Reg. v. Taylor, Law Rep. 2 C. C. 147; 2 Bish. New Crim. L. Com. s 311.

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. Every one is guilty of an offence and liable, on summary conviction, to imprisonment for a term not exceeding twelve months and not less than three months, *with or without hard labour* who engages as a principal in a prize-fight. R.S.C., c. 153, s. 3.

95. Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding five hundred dollars and not less than fifty dollars, or to imprisonment for a term not exceeding twelve months, *with or without hard labour* or to both, who is present at a prize-fight as an aid, second, surgeon, umpire, backer, assistant or reporter, or who advises, encourages or promotes such fight. R. S.C., c. 153, s. 4.

96. 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. If, after hearing evidence of the circumstances connected with the origin of the fight or intended fight, the person before whom the complaint is made is satisfied that such fight or intended fight was *bonâ fide* the consequence or result of a quarrel or dispute between the principals engaged or intended to engage therein, and that the same was not an encounter or fight for a prize, or on the result of which the handing over or transfer of money or property depended, such person may, in his discretion, discharge the accused or impose upon him a penalty not exceeding fifty dollars. R.S.C. c. 153, s. 9.

The only alteration made, by articles 93, 94, 95, and 96, in the law as contained in sections 2, 3, 4 and 5, R. S. C., chap. 153 is the addition of "with or without hard labor" in regard to imprisonment.

Whenever any sheriff, police officer, constable, or other peace officer has reason to believe that any person within his district is about to engage in any prize fight within Canada it is his duty to forthwith arrest such person and make complaint against him before any one having authority to try offences under the above articles, and if the complaint is made out the accused shall be required to furnish security, in a sum not exceeding $5,000 and not less than $1,000, not to engage in any such fight within one year from his arrest, and whenever any sheriff has reason to believe that a prize fight is taking place or about to take place within his district or that any persons from outside of Canada are about to come into Canada at a point within his district to engage in, be concerned in or attend any prize fight in Canada, he shall, with force, suppress and prevent such fight, and arrest all persons present at it or who come into Canada as aforesaid, and prosecute and have them punished or placed under recognizances according to the nature of the case.

Within the limits of their respective jurisdictions 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 are vested with all the powers of a justice of the peace with respect to offences against the above articles relating to prize fights. (1)

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.

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, (2) an explosion of a nature likely to endanger life or to cause serious injury to property, whether any injury to person or property is actually caused or not. R.S C., c. 150, s. 3.

100. Doing any act or possessing explosives with intent to cause explosions.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who wilfully—

(*a.*) does any act with intent to cause by an explosive substance, or conspires to cause by an explosive substance an explosion of a nature likely to endanger life, or to cause serious injury to property;

(*b.*) make or has in his possession or under his control any explosive substance with intent by means thereof to endanger life or to cause serious injury to property, or to enable any other person by means thereof to endanger life or to cause serious injury to property—whether any explosion takes place or not and whether any injury to person or property is actually caused or not. R.S.C., c. 150, s. 4.

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

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(1) See articles 6, 7, and 10, (unrepealed) R.S.C. chap. 153, in appendix, *post.*
(2) For meaning of explosive substance see Article 3 (*i*), *ante* p. 3.

who makes, or knowingly has in his possession or under his control, any explosive substance under such circumstances as to give rise to a reasonable suspicion that he is not making it, or has it not in his possession or under his control, for a lawful object, unless he can show that he made it or had it in his possession or under his control for a lawful object. R.S.C., c. 150, s. 5.

When any person is charged before a justice of the peace with the offence of making or having explosive substances no further proceeding is to be taken against him, without the consent of the Attorney-General, except such as the justice thinks necessary, by remand or otherwise to secure the person's safe custody. (1)

102. Having offensive weapons for dangerous purposes.—Every one is guilty of an indictable offence and liable to five years' imprisonment who has in his custody or possession, or carries, any offensive weapons for any purpose dangerous to the public peace. R.S.C., c. 149, s. 4.

No prosecution for any offence against this article can be commenced after the expiration of six months from its commission. (2)

103. Openly carrying offensive weapons so as to cause alarm.—If two or more persons openly carry offensive weapons in a public place in such a manner and under such circumstances as are calculated to create terror and alarm, each of such persons is liable, on summary conviction before two justices of the peace, to a penalty not exceeding forty dollars and not less than ten dollars, and in default of payment to imprisonment for any term not exceeding thirty days. R.S.C., c. 148, s. 8.

No prosecution for any offence against this article, or against articles 105 to 111 inclusive, can be commenced after the expiration of one month from its commission. (3)

104. Smugglers carrying offensive weapons.—Every one is guilty of an indictable offence and liable to imprisonment for ten years who is found with any goods liable to seizure or forfeiture under any law relating to inland revenue, the customs, trade or navigation, *and knowing them to be so liable*, and carrying offensive weapons. R. S. C., c. 32, s. 213.

This article changes the law, as contained in sec. 213 R. S. C. c. 32, by reducing the punishment from life imprisonment to ten years, and by the insertion of the words "and knowing them to be so liable."

"Offensive weapon" includes any gun or other firearm, or air-gun, or any part thereof, or any sword, sword blade, bayonet, pike, pike-head, spear, spear-head, dirk, dagger, knife or other instrument intended for cutting or stabbing, or any metal knuckles, or other deadly or dangerous weapon and any instrument or thing intended to be used as a weapon, and all ammunition which may be used with or for any weapon. (4)

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(1) See article 545, *post*.
(2) See article 551 (*d*), *post*.
(3) See article 551 (*f*), *post*
(4) See article 3 (*r*), *ante* p. 5.

105. Carrying a pistol or air gun without justification.—Every one is guilty of an offence and liable on summary conviction to a penalty not exceeding twenty-five dollars and not less than five dollars, or to imprisonment for one month, who, not being a justice or a public officer, or a soldier, sailor or volunteer in Her Majesty's service, on duty, or a constable or other peace officer, and not having a certificate of exemption from the operation of this section as hereinafter provided for, and not having at the time reasonable cause to fear an assault or other injury to his person, family or property, has upon his person a pistol or air-gun *elsewhere than in his own dwelling-house, shop, warehouse, or counting-house.*

2. If sufficient cause be shown upon oath to the satisfaction of any justice, he may grant to any applicant therefor not under the age of sixteen years and as to whose discretion and good character he is satisfied by evidence upon oath, a certificate of exemption from the operation of this section, for such period, not exceeding twelve months, as he deems fit.

3. Such certificate, upon the trial of any offence, shall be *primâ facie* evidence of its contents and of the signature and official character of the person by whom it purports to be granted.

4. When any such certificate is granted under the preceding provisions of this section, the justice granting it shall forthwith make a return thereof to the proper officer in the county, district or place in which such certificate has been granted for receiving returns under section nine hundred and two ; and in default of making such return within ninety days after a certificate is granted, the justice shall be liable, on summary conviction, to a penalty of not more than ten dollars.

5. Whenever the Governor in Council deems it expedient in the public interest, he may by proclamation suspend the operation of the provisions of the first and second sub-sections of this section respecting certificates of exemption, or exempt from such operation any particular part of Canada, and in either case for such period, and with such exceptions as to the persons hereby affected, as he deems fit.

106. Selling pistol or air-gun to minor.—Every one is guilty of an offence and liable on summary conviction to a penalty not exceeding fifty dollars, who sells or gives any pistol or air-gun, or any ammunition therefor, to a minor under the age of sixteen years, unless he establishes to the satisfaction of the justice before whom he is charged that he used reasonable diligence in endeavouring to ascertain the age of the minor before making such sale or gift, and that he had good reason to believe that such minor was not under the age of sixteen :

2. Every one is guilty of an offence and liable on summary conviction to a penalty not exceeding twenty-five dollars who sells any pistol or air-gun without keeping a record of such sale, the date thereof, and the name of the purchaser and of the maker's name, or other mark by which such arm may be identified.

107. Having weapon when arrested.—Every one who when arrested, either on a warrant issued against him for an offence or

while committing an offence, has upon his person a pistol or air-gun is guilty of an offence and liable, on summary conviction before two justices of the peace, to a penalty not exceeding fifty dollars and not less than twenty dollars, or to imprisonment for any term not exceeding three months, *with or without hard labour*. R.S.C., c. 148, s. 2.

108. Having weapon with intent to injure any one.—Every one who has upon his person a pistol or air-gun, with intent therewith unlawfully to do injury to any other person, is guilty of an offence and liable, on summary conviction before two justices of the peace, to a penalty not exceeding two hundred dollars and not less than fifty dollars, or to imprisonment for any term not exceeding six months, *with or without hard labour*. R.S.C., c. 148, s. 3.

109. Pointing any firearm at anyone.—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.

This article changes the amount of penalty, which, under sec. 4, R. S. C. c. 148, was a maximum of $50 and a minimum of $20. It also adds "with or without hard labor" in the clause providing for imprisonment.

The same addition "with or without hard labor" is made in articles 107, 108, 110, 111, 118, and 119.

110. Carrying offensive weapons.—Every one who carries about his person any bowieknife, dagger, dirk, metal knuckles, skull cracker, slung shot, or other offensive weapon of a like character, or secretly carries about his person any instrument loaded at the end, or sells or exposes for sale, publicly or privately, any such weapon, or being masked or disguised carries or has in his possession any firearm or air-gun, is guilty of an offence and liable, on summary conviction before two justices of the peace, to a penalty not exceeding fifty dollars and not less than ten dollars, and in default of payment thereof to imprisonment for any term not exceeding thirty days, *with or without hard labour*. R.S.C., c. 148, s. 5.

111. Carrying sheath-knives. — Every one, not being thereto required by his lawful trade or calling, who is found in any town or city carrying about his person any sheath-knife is liable, on summary conviction before two justices of the peace, to a penalty not exceeding forty dollars and not less than ten dollars, and in default of payment thereof to imprisonment for any term not exceeding thirty days, *with or without hard labour*. R.S.C., c. 148, s. 6.

112. Exception as to soldiers, &c.—It is not an offence for any soldier, public officer, peace officer, sailor or volunteer in Her Majesty's service, constable or other policeman, to carry loaded pistols or other usual arms or offensive weapons in the discharge of his duty. R.S.C., c. 148, s. 10.

113. Refusing to deliver offensive weapon to a justice.—Everyone attending any public meeting or being on his way to attend the same who, upon demand made by any justice of the peace within whose jurisdiction such public meeting is appointed to be held, declines or refuses to deliver up, peaceably and quietly, to such justice of the peace, any offensive weapon with which he is armed or which he has in his possession, is guilty of an indictable offence.

2. The justice of the peace may record the refusal and adjudge the offender to pay a penalty not exceeding eight dollars, or the offender may be proceeded against by indictment as in other cases of indictable offences. R.S.C., c. 152, s. 1.

114. Coming armed near public meeting.—Every one, except the sheriff, deputy sheriff and justices of the peace for the district or county, or the mayor, justices of the peace or other peace officer for the city or town respectively, in which any public meeting is held, and the constables and special constables employed by them, or any of them, for the preservation of the public peace at such meeting, is guilty of an indictable offence, and liable to a penalty not exceeding one hundred dollars, or to 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.

This article reduces, to one mile, the distance within which a person must not come armed. Under the old law it was two miles.

115. Lying in wait for persons returning from Public Meeting.—Every one is guilty of an indictable offence and liable to a penalty not exceeding two hundred dollars, or to imprisonment for a term not exceeding six months, or to both, who lies in wait for any person returning, or expected to return, from any such public meeting, with intent to commit an assault upon such person, or with intent, by abusive language, opprobrious epithets or other offensive demeanour, directed to, at or against such person, to provoke such person, or those who accompany him, to a breach of the peace. R.S.C., c. 152, s. 6.

No prosecution for any offence against articles 113, 114 and 115 can be commenced after the expiration of one year from its commission. (1)

116. Sale of Arms in North-West Territories.—Every one is guilty of an offence and liable, on summary conviction before two justices of the peace, to a penalty of two hundred dollars or to six months' imprisonment, or to both, who, during any time when and within any place in the North-West Territories where section one hundred and one of *The North-West Territories Act* is in force—

(*a.*) without the permission in writing (the proof of which shall be on him) of the Lieutenant Governor, or of a commissioner appointed by him to give such permission, has in his possession or

(1) See articie 551 (*c*), *post.*

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.

117. Possessing Weapons near Public Works. — Every one employed upon or about any public work, within any place in which the *Act respecting the Preservation of Peace in the vicinity of Public Works* is then in force, is liable, on summary conviction, to a penalty not exceeding four dollars and not less than two dollars for every such weapon found in his possession who, upon or after the day named in the proclamation by which such Act is brought into force, keeps or has in his possession, or under his care or control, within any such place, any weapon.

2. Every one is liable, on summary conviction, to a penalty not exceeding one hundred dollars and not less than forty dollars who, for the purpose of defeating the said Act, receives or conceals, or aids in receiving or concealing, or procures to be received or concealed within any place in which the said Act is at the time in force, any weapon belonging to or in custody of any person employed on or about any public work. R. S. C., c. 151, ss. 1, 5 and 6.

118. Sale &c., of liquors near public works.—Upon and after the day named in any proclamation putting in force in any place *An Act respecting the Preservation of Peace in the vicinity of Public Works*, and during such period as such proclamation remains in force, no person shall, at any place within the limits specified in such proclamation, sell, barter, or directly or indirectly, for any matter, thing, profit or reward, exchange, supply or dispose of any intoxicating liquor, nor expose, keep or have in possession any intoxicating liquor intended to be dealt with in any such way.

2. The provisions of this section do not extend to any person selling intoxicating liquor by wholesale and not 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.

119. Intoxicating liquors on board Her Majesty's ships.—Everyone is guilty of an offence and liable, on summary conviction before two justices of the peace, to a fine not exceeding fifty dollars for each offence. and in default of payment to imprisonment for a term not exceeding one month, *with or without hard labour*, who, without the previous consent of the officer commanding the ship or vessel—

(*a.*) conveys any intoxicating liquor on board any of Her Majesty's ships or vessels ; or

(*b.*) approaches or hovers about any of Her Majesty's ships or vessels for the purpose of conveying any such liquor on board thereof : or

(*c.*) gives or sells to any man in Her Majesty's service, on board any such ship or vessel, any intoxicating liquor. 50-51 V., c. 46, s. 1.

PART VII.

SEDITIOUS OFFENCES.

120. Unlawful oaths.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who—

(*a.*) administers, or is present at and consenting to the administration of, any oath or any engagement purporting to bind the person taking the same to commit any crime punishable by death or imprisonment for more than five years ; or

(*b.*) attempts to induce or compel any person to take any such oath or engagement ; or

(*c.*) takes any such oath or engagement.

121. Every one is guilty of an indictable offence and liable to seven years' imprisonment who—

(*a.*) administers or is present at and consenting to the administration of any oath or engagement purporting to bind the person taking the same :

(i.) to engage in any mutinous or seditious purpose ;

(ii.) to disturb the public peace or commit or endeavour to commit any offence ;

(iii.) not to inform and give evidence against any associate, confederate or other person ;

(iv.) not to reveal or discover any unlawful combination or confederacy, or any illegal act done or to be done or any illegal oath or obligation or engagement which may have been administered or

tendered to or taken by any person, or the import of any such oath or obligation or engagement; or

(*b.*) attempts to induce or compel any person to take any such oath or engagement; or

(*c.*) takes any such oath or engagement. C.S.L.C., c. 10, s. 1.

122. Any one who, under such compulsion as would otherwise excuse him, offends against either of the last two preceding sections shall not be excused thereby unless, within the period hereinafter mentioned, he declares the same and what he knows touching the same, and the persons by whom and in whose presence, and when and where, such oath or obligation or engagement was administred or taken, by information on oath before one of Her Majesty's justices of the peace for the district or city or county in which such oath or engagement was administered or taken. Such declaration may be made by him within fourteen days after the taking of the oath or, if he is hindered from making it by actual force or sickness, then within eight days of the cessation of such hindrance, or on his trial if it happens before the expiration of either of those periods. C. S. L. C., c. 10, s. 2.

These three articles are taken from sections 1, 2, 3 and 4 of chapter 10 of the Consolidated Statutes of Lower Canada. With regard to the province of Quebec there is no doubt that the remaining sections 5, 6, 7, 8 and 9, (unrepealed), of that Act are still in force, and the law as contained therein may probably also apply to British Columbia, Manitoba and the North-West, seeing that the statute was simply a re-enactment of the English law on the subject as it stood, in 1837, under 52 Geo. 3, c. 104, and 7 Will. 4 & 1 Vic., c. 91.

Under the law as embodied in these unrepealed sections of chap. 10, C. S. L. C., it is an indictable offence punishable by seven years' imprisonment, to become a member of or to correspond or hold intercourse with or in any way to aid or support any society or association thereby declared to be an unlawful combination or confederacy; and every society or association is thereby deemed to be an unlawful combination or confederacy,—

1. Whose members, according to the rules thereof, or to any provision or any agreement for that purpose, are (*a*) *required to keep secret the acts or proceedings thereof*, or (*b*) admitted to take any unlawful oath or engagement within the meaning of that act, or any oath or engagement not required or authorized by law.

2. Whose members or any of them take or in any manner bind themselves by any such oath or engagement or in consequence of being members thereof.

3. Whose members or any of them *take, subscribe or assent to any engagement of secrecy* test or declaration not required by law.

4. The names of whose members, or any of them, are kept secret from the society at large.

5. Which has any committee or secret body so chosen or appointed that the members constituting the same are not known by the society at large to be members of such committee or select body.

6. Which has any president, treasurer, secretary, delegate or other officer so chosen or appointed that his election or appointment to such office is not known to the society at large.

7. Of which the names of all the persons and of the committee or select bodies of members and of all presidents, treasurers, secretaries, delegates and other officers are not entered in a book kept for that purpose and open for the inspection of all the members.

8. Which is composed of different divisions or branches or of different parts acting in any manner separately or distinct from each other, or of which any part has any separate or distinct president, secretary, treasurer, delegate or other officer elected or appointed by or for such part or to act as an officer for such part.

The provisions of the law as contained in chap. 10 C. S. L. C. do not extend to the meetings of any society or lodge of freemasons constituted by or under the authority of warrants in that behalf granted by or derived from any grand master or grand lodge in the United Kingdom of Great Britain and Ireland or the grand master or grand lodge of Canada.

The grand lodge of Canada exercises no authority over masonic lodges in the province of Quebec. In that province a separate body called the Grand Lodge of Quebec exercises jurisdiction over a number of masonic lodges to whom its warrants have been issued for the holding of meetings and the practice of masonry. In addition to these there are in the city of Montreal three old lodges of freemasons constituted and still working under warrants of the Grand Lodge of England, of which H. R. H. the Prince of Wales is the present Grand Master. Although these two sets of freemasons are on terms of the greatest friendship there can be no move towards their amalgamation until the existing doubt as to the legal status of the lodges of the Quebec Register is cleared away by placing them, by means of special legislation, (as was done with the Grand Lodge of Canada), within the exception which relieves freemasons of the English Register from the operation of the law against secret societies.

In the province of Quebec, the Loyal Orange Institution was held to be an illegal association combination and confederacy, the members thereof being bound by an oath to keep secret the proceedings of the association. The Orange Lodges had assembled in their meeting rooms in Montreal for the purpose of walking in procession, according to their annual custom on the twelfth of July, when the Mayor with the assistance of a large band of special constables armed with sticks, forcibly prevented the procession, and arrested the chief officers; and in an action of damages for false arrest taken by them against the mayor, the latter was held to have acted legally, the Orange order being an unlawful body, and there being a well grounded apprehension of a serious public disturbance taking place if the procession had been allowed to form and appear on the streets. (1)

123. Seditious words libels and conspiracies.—No one shall be deemed to have a seditious intention only because he intends in good faith—

(*a.*) to show that Her Majesty has been misled or mistaken in her measures; or

(*b.*) to point out errors or defects in the government or constitution of the United Kingdom, or of any part of it, or of Canada or any province thereof, or in either House of Parliament of the United Kingdom or of Canada, or in any legislature, or in the administration of justice; or to excite Her Majesty's subjects to attempt to procure, by lawful means, the alteration of any matter in the state; or

(*c.*) to point out, in order to their removal, matters which are producing or have a tendency to produce feelings of hatred and ill-will between different classes of Her Majesty's subjects.

2. Seditious words are words expressive of a seditious intention.

3. A seditious libel is a libel expressive of a seditious intention.

4. A seditious conspiracy is an agreement between two or more persons to carry into execution a seditious intention.

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

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(1) Grant & Beaudry, 4 L. N. 394, Q. B. (1881).

It will be seen by these articles that there are three different ways in which a seditious offence may be committed, namely, by speaking words expressive of a seditious intention, by publishing a libel expressing a seditious intention, and by entering into a conspiracy to carry a seditious intention into execution. But there is no definition given shewing what a seditious intention is.

In section 102 of the English Draft Code there is, in addition to what is above contained in article 123, a clause defining a seditious intention as,—

"An intention—

"to bring into hatred or contempt or to excite disaffection against the person "of Her Majesty, or the government and constitution of the United Kingdom "or of any part of it as by law established, or either House of Parliament, or "the administration of justice; or

"to excite Her Majesty's subjects to attempt to procure, *otherwise than by "lawful means*, the alteration of any matter in church or state by law established; or

"to raise discontent or disaffection amongst Her Majesty's subjects; or

"to promote feelings of ill-will and hostility between different classes of such subjects."

In a note to this section the Royal Commissioners say that this is as accurate a statement of the existing law as they can make; and as references they give 60 Geo. 3 & 1 Geo. 4, chap. 8, O'Connell v. R., 11 Cl. & F. 155, 234, R. v. Lambert & Perry, 2 Camp. 398, R. v. Vincent 9 C. & P. 91. In the body of their Report they also say in reference to seditious offences. "On this very delicate subject "we do not undertake to suggest any alteration of the law. It is not easy to "find explicit authority earlier than the case of R. v. Frost, (22 St. Tr. 471, tried "before Lord Kenyon in 1793), for the proposition that to speak seditious "words is an indictable offence. A passage in the 3rd institute (p. 14) certainly "says. But words without an overt deed are to be punished in another degree "as a high misprision. This, however, is an incidental remark at the end of a "passage, the main point of which is that mere words are not in general an "overt act of treason;"

The Canadian Code as originally drawn and introduced into Parliament contained a clause defining a seditious intention in terms similar to those above quoted from section 102 of the English Draft; but the clause evoked a long discussion and a great deal of criticism during the consideration of the Bill in Committee; and it was altimately decided to strike out the clause, and leave the definition to common law (1).

In tracing, with his usual clearness and ability, the history of this most interesting branch of the law, Sir James F. Stephen says, that there are "two "different views of the relation between rulers and their subjects. If the ruler "is regarded as the superior of the subject, as being by the nature of his "position presumably wise and good,—the rightful ruler and guide of the whole "population,—it must necessarily follow that it is wrong to censure him openly, "that if he is mistaken his mistakes should be pointed out with the utmost "respect, and that whether mistaken or not no censure should be cast upon "him likely or designed to diminish his authority. If, on the other hand, the "ruler is regarded as the agent or servant and the subject as the wise and good "master who is obliged to delegate his power to the so-called ruler because, "being a multitude, he cannot use it himself, it is obvious that this sentiment "must be reversed. Every member of the public who censures the ruler for the "time being exercises in his own person the right which belongs to the whole "of which he forms part. He is finding fault with his servant. If others think "differently they can take the other side of the dispute, and the utmost that can "happen is that the servant will be dismissed and another put in his place, or "perhaps that the arrangements of the household will be modified. To those "who hold this view fully, and carry it out to all its consequences there can be

(1) See Extra Appendix *post*.

"no such offence as sedition. There may indeed be breaches of the peace, "which may destroy or endanger life limb or property, and there may be "incitements to such offences, but no imaginable censure of the government, "short of censure which has an immediate tendency to produce such a breach "of the peace ought to be regarded as criminal." (1)

After stating that each of these extreme views has had a considerable share in moulding the law of England so as to practically produce a compromise such as is expressed in section 102 of the English Draft Code, (upon a part of which our article 123 is based), Sir James F. Stephen proceeds to trace the history of the legislation and of the legal controversies which, in conjunction with the development of broader popular views, have brought about this compromise (2).

This history is of no small value in arriving at a proper appreciation of the present state of the law in regard to these offences; and I therefore take the liberty of giving here a short outline of it.

Under the old idea a libel was written blame, *true or false*, of any man public or private. For a long time the law was administered by the Star Chamber, the name given, during the Tudor period, to the king's privy council sitting as a court,— composed of the lord chancellor, the lord treasurer, the keeper of the privy seal, a bishop, a lord of the council, and the two chief-justices,—and trying cases and adjudging, without the aid of any jury, matters of fact as well as matters of law.

During the sixteenth century the Star Chamber took upon itself, in the plenitude of its power, to make and enforce, with extreme rigor and severity, a number of decrees and ordinances regulating the manner of printing and the number of presses throughout the kingdom, and prohibiting all printing and publishing against the meaning of the statutes and laws of the realm.

At that time libels, as such, would not receive a great deal of attention, many offences being more severely dealt with as treasons, which at a later period would only be treated, at most, as seditious libels; for although, as already seen, mere words unconnected with any deed were not regarded as an overt act of treason the publication of written words were regarded in that light, when they displayed a treasonable intention (3).

After the abolition of the Star Chamber in 1641 by the Long Parliament, the latter introduced the system of licensing books, which system was continued by various Licensing Acts passed in the following reigns of Charles II, James II and William & Mary, until it finally expired in 1794.

The licensing system and the special laws,—which, under the Commonwealth and under Charles II, exposed political libellers to prosecutions for treason, —made it very difficult and dangerous to publish any books or pamphlets objectionable to the government; and cases involving a discussion of the law of libel would not during this period be very numerous. Many prosecutions were either for offences amounting to treasonable publications under the special laws referred to, or for publishing without a license or in violation of some of the provisions of the Licensing Acts. As Sir Jas. F. Stephen remarks, until the right to publish without license is conceded the question of the limits of the right does not become debateable. (4)

On the abolition of the Star Chamber, cases of libel,—whenever they did arise,—were tried in the Court of King's Bench; and the trials were by jury; but the Judges of that Court adopted and continued, for a long time, to follow, in regard to libel, the stringent doctrines of the Star Chamber, and held that,— as a libel was written blame, whether true or false, and as the law required the exact words of the matter complained of to be set out in order to judge by its

(1) 2 Steph. Hist. Cr. L. 298–300.
(2) Steph. Hist. Cr. L. 300–386.
(3) 3 Inst. 14; 2 Steph. Hist. Cr. L. 302.
(4) 2 Steph. Hist. Cr. L. 310,

tenor,of its libellous nature,—the question of whether it was or was not a libel was a question of law for the Court, and that the only questions of fact to be left to the jury were, "Did the defendant publish it? And were the innuendoes (if there were any) correct?

This rule, confining the jury to the simple question of whether or not the defendant committed the act of publishing, prevented them,—as the presiding judge invariably charged them,—from going into the intentions or motives of the author or the circumstances connected with the publication; for, the matter set out and complained of being in law libellous on its face, the act of publishing when found by the jury rendered the conviction complete.

After a time efforts were made by very distinguished advocates,—and especially towards the end of the eighteenth century by Erskine,—to bring about the adoption of a definition of libel different from that theretofore acted upon and more in accordance with changed popular sentiment. The controversy thus occasioned ultimately led to the passing of Fox's Libel Act in 1792.

It was during this controversy that the trial took place of the Dean of St. Asaph, who was prosecuted for a seditious libel said to be contained in certain extracts taken from a pamphlet called a dialogue between a gentleman and a farmer, (1) Mr. Justice Buller in his charge said that the only facts for the jury were the fact of publication and the meaning of the innuendoes; and they returned a verdict of guilty. On behalf of the defendant Erskine then moved for a new trial; and, in his argument thereon before Lord Mansfield, he submitted that the criminal intent was a fact to be found, like any other, by the jury, and that the case of libel formed no legal exception to the general principles which govern the trial of all other crimes. (2) He supported his argument by the celebrated illustration first suggested by Algernon Sidney,—A is indicted for publishing a blasphemous libel in the words, "There is no God." Evidence is given that he sold a bible containing the words, "The fool hath said in his "heart, there is no God." The matter complained of and set out in the indictment being the words, "There is no God," there is no need for any innuendo; and the jury would be bound, upon the old view of the law, to convict the defendant because, according to that old view, they had nothing to do with his intention, and on moving in arrest of judgment the defendant would be met with the answer that the indictment was good on its face, as the words were blasphemous in themselves, and the jury had found their publication.

As Erskine's argument proceeded, Lord Mansfield said, "To be sure, the jury "may judge from the whole context:" to which Erskine replied, "And what "is this, my lord, but determining the question of libel?"

Lord Mansfield: "They certainly may in all cases go into the whole context."

Mr Erskine: "And why may they go into the context? Clearly, my lord, to "enable them to form a correct judgment of the meaning of the part indicted, "even though no particular meaning be submitted to them by averments in the "indictment."

In commenting upon this portion of Erskine's argument Sir James F. Stephen says that, in his opinion, the jury might look at the whole to see whether the words "There is no God," mean "*to deny the existence of God*," but that it does not follow that they were at liberty to consider what object the author had in view, or by what motives he was actuated when he made the assertion, if he did make it. (3)

For my own part I think that one among other good reasons for holding the jury entitled to look at the whole context would have been so that they could see if the author himself did in reality make the assertion "There is no God"; in other words, to see if the book itself by its whole tenor actually asserted, (which it surely did not), that, "there is no God," or merely stated what a fool had in his heart foolishly asserted to that effect.

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(1) 21 St. Tr. 953.
(2) 2 Steph. Hist. Cr. L. 338.
(3) 2 Steph. His. Cr. L. 338.

Erskine, in continuation of his argumeut, contended that as the writing in question in the Dean of St. Asaph's case neither contained nor was averred by the indictment to contain any slander of an individual, and as its criminality was charged to consist in its tendency to stir up general discontent, the trial of such a charge did not involve and could not in its obvious nature involve any abstract question of law for the judgment of a Court, but must wholly depend upon the judgment of the jury on the tendency of the writing to produce such consequences when connected with all the circumstances attending its publication. The question of seditious intention, he submitted, must in the nature of things be a question of fact dependent upon a variety of circumstances which could not appear on the record, to which the Court was confined; for words, which, in their literal meaning, were indifferent, temperate, or even conciliatory, might when spoken or written under special circumstances be seditious. He said, "Circumscribed "by the record your Lordship can form no judgment of the tendency of this "dialogue to excite sedition by anything but the mere words. You must look "at it as if it were an old M. S. dug out of the ruins of Herculaneum. You can "collect nothing from the time when or the circumstances under which it was "published, the person by whom and those amongst whom it was circulated; "yet these may render a paper, at one time and under some circumstances, "dangerously wicked and seditious, which at another time and under different "circumstances might be innocent and highly meritorious." (1)

Lord Mansfield however, upheld the doctrine that the jury had nothing to determine but the question of publishing and that of the innuendoes, and accordingly dismissed the motion for new trial. He traced the history down to that time of the development of the law of seditious libel; and in support of his judgment he cited, amongst other authorities, the cases of R. v. Clarke and R. v. Francklin, (in the reign of George II), of Miller, Almon and Woodfall, (in 1770), and the later case of R. v. Stockdale.

Erskine afterwards moved, in the Dean of St. Asaph's case, in arrest of judgment, on the ground that the matter set forth and complained of was not libellous; and he succeeded.

This was in 1783; and nine years later Fox's Libel Act, (2) became law. By that Act it was enacted that in any trial of an indictment for libel, it should be competent for the jury to give their verdict on the whole matter in issue, and that they should not be required or directed by the Court or Judge to find the defendant guilty merely on proof of publication by the defendant of the paper charged as a libel and of the sense ascribed to it in such indictment; but it was provided that the Court should, according to its discretion, give its opinion and directions on the matters in issue in the same manner as in other criminal cases. Nearly thirty years later was passed the 60 Geo. 3 & 1 Geo. 4, c. 8, which practically defines a seditious libel as one which tends to bring into hatred or contempt the person of the reigning sovereign his heirs or successors, or the government or the constitution of the United Kingdom as by law established or either House of Parliament, or to excite His Majesty's subjects to attempt the alteration of any matter in Church or State as by law established otherwise than by lawful means. Since the Reform Bill of 1832 there have been few instances of prosecutions for seditious libel; the more recent ones,—such as that of Most. (3),—being, in reality, incitements to commit against reigning sovereigns, crimes of a similar kind to that of the assassination of the Emperor Alexander III of Russia.

The law of seditious libel has been insensibly modified by the law of defamatory libels upon private persons, which has been the subject of a great many important decisions, the effect of which has been, "amongst other things, to "give the right to every one to criticise fairly, that is, honestly, even if "mistakenly, the public conduct of public men, and to comment honestly

(1) 2 Steph. Hist. Cr. L. 340.
(2) 32 Geo. 3, c. 60.
(3) Reg. v. Most, 7 Q. B. D. 244; 50 L. J. (M. C.) 113.

"even if mistakenly upon the proceedings of parliament and the courts of "justice." (1)

In regard to the irrelevancy of the truth of the matter complained of in the case of a libel, considered as a criminal offence, the law according to the original theory of libel fell into two main classes, namely, 1, the class in which written blame was cast upon the institutions of the country and the general conduct of the government, and, 2, the class consisting of attacks upon individuals whether public men or not. As to the first of these classes the principle was that no one should be allowed to attempt to bring into discredit the institutions of his country, and that their defects should be matter for representation to parliament by means of petition; but this principle has been superseded by the exception that, when criticism of existing institutions is made in good faith with the view of bringing about improvements and of removing defects, it is lawful, even if mistaken. With regard to criticism of this kind it may still be said that, when it is the subject of a prosecution for seditious libel its truth is immaterial; because the question at issue is not the truth or falsity of the assertions made, but what was the writer's object. Was it to procure a remedy by peaceable and lawful means, or was it to promote disaffection and bring about riots?

With regard to attacks made, by a newspaper or a pamphlet or any other written or printed publication, upon an individual holding a public position, such attacks do not, in general, charge him with anything for which he could be made responsible criminally but only with misconduct for which public discussion is practically the only available remedy. If the truth of such charges were not allowed to be proved by way of justification for making them much official misconduct and incapacity would be practically altogether unchecked. For cases of this kind provision has been made in two separate ways, namely,—1, by the establishment of the rule that it is lawful to make fair comment upon matters of public interest,—a rule established in a number of civil cases for libel but equally applicable to criminal prosecutions,—and, 2, by the passing of Lord Campbell's Act, (2) duly re-enacted in Canada, (3) by which it was provided that it should be competent for a defendant on an indictment or information for defamatory libel to plead the truth of the matters charged and that it was for the public benefit that such matters should be published.

With regard to seditious words they have on some few occasions been made the subject of prosecution,—the charge however being that of unlawful assembly or of seditious conspiracy, of which violent speeches were regarded as overt acts. In 1795, one Redhead Yorke was prosecuted and convicted on a charge of conspiracy to traduce and vilify the House of Commons and the government and to excite disaffection and sedition; and as overt acts of the conspiracy it was alleged that meetings were held to make and listen to seditious and inflammatory speeches (4).

In 1820 Hunt was prosecuted for a conspiracy of which the holding of the meeting dispersed in 1819 at Manchester was the principal overt act; and in 1844 O'Connell and others were tried for seditious conspiracy, with intent to stir up hatred and strife between the Queen's English and Irish subjects of which conspiracy the meetings held and the speeches made in connection with the agitation for repeal of the union between England and Ireland were overt acts.

That case shews how wide the legal notion of seditious conspiracy is. It seems to include every sort of attempt,—by violent language, either spoken or written, or by shew of force calculated to produce fear,—to effect any public object of an evil character; and no precise or complete definition has ever been given of objects which are to be regarded as evil.

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(1) 2 Steph. Hist. Cr. L. 376.
(2) 6 and 7 Vic., c. 96.
(3) R. S. C., c. 163; 37 Vic., c. 38.
(4) 25 St. Tr. 1003; 2 Steph. Hist. Cr. L. 379.

At the present day, when the right of forming political organizations, of holding political meetings, and of giving,—through the press, or on the public platform,—free expression to our thoughts upon and criticisms of public men and affairs, is so well recognized, a written or printed publication, a public speech, or an assembly, meeting, convention or combination would have to be of an extremely vicious, inflammatory, and dangerous character to form the basis of a successful prosecution for a seditious libel, a seditious speech, or a seditious conspiracy.

125. Libels on foreign sovereigns.—Every one is guilty of an indictable offence and liable to one year's imprisonment who, without lawful justification, publishes any libel tending to 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. (1)

126. Spreading false news.—Every one is guilty of an indictable offence and liable to one year's imprisonment who wilfully and knowingly publishes any false news or tale whereby injury or mischief is or is likely to be occasioned to any *public* interest.

This is an old common law offence, prosecutions for which seem to have long since fallen out of practice. In 1778 there was a case of this kind in which the defendant was indicted for, having unlawfully wickedly and maliciously published false news,—whereby discord might grow between the king and his subjects or the great men of the realm,—by publishing and placarding a printed paper or notice falsely announcing that an order in council had been made by the king proclaiming war with France (2).

PART VIII.

PIRACY.

127. Piracy by the law of nations.—Every one is guilty of an indictable offence who does any act which amounts to piracy by the law of nations, and is liable to the following punishment :—

(*a.*) To death, if in 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 or by the law of nations.—In reference to piracy the Royal Commissioners in their report on the English Draft Code say,—

" The Bill contained a definition of *Piracy by the law of Nations.* We have " thought it better to leave this offence undefined, as no definition of it would be " satisfactory which is not recognized as such by other nations; and after

(1) See Most's case, cited *ante* p. 70.
(2) Scott's case, 5 New Newgate Calendar, 284 ; 1 Bish. New Cr. L. Com. s. 477.

" careful consideration of the subject we have not been able to discover a " definition fulfilling such a condition. We may observe as to this that the " subject has been much discussed in the Courts of the United States, and the " result appears to justify the course we have adopted. We do not think it will " lead to practical inconvenience."

Sir James F. Stephen says in relation to this subject, " Piracy at common law " or by the law of nations, is the only one of the offences mentioned " [piracy, slave trading, etc.] " which is not created by statute. There are singularities " connected with the offence which I do not think it necessary to go into. The " most authoritative definition of piracy in English law is '*robbery at sea*,' but " I think it is easy to show that this is too wide in one direction and too narrow " in another. If a foreign sailor on a foreign ship were to rob another sailor of " the same nation on the same ship it would be absurd to call him a pirate, yet " such an act would be *robbery at sea*; and if a piratical vessel were to attempt " to capture a lawful ship and to be captured herself, it would be strange to " describe her crew as anything but pirates, yet they would have committed, not " what on shore would have been a robbery, but what would have been an " assault with intent to rob." (1)

Robbery on the high seas in order to constitute piracy must be without authority from any prince or state. If a party making a capture at sea do so by the authority of any prince or state it cannot be considered piracy: for a nation can never be deemed pirates. Fixed domain, public revenue and a certain form of government exempt a people from that character. (2)

If the subjects of the same state, being in separate vessels, commit robbery upon each other upon the high sea, it is piracy. If the subjects of different states commit robbery upon each other upon the high sea, if their respective states be in amity, it is piracy; if at enmity it is not; for it is a general rule that enemies can never commit piracy upon each other, their depredations being deemed mere acts of hostility. (3)

Piracy by statute.—The principal Imperial statutes relating to and making certain actions piracy are 28 Hen. 8, c. 15; 11 Will. 3, c. 7, s. 7; 8 Geo. 1, c. 24, s. 1; 18 Geo. 2, c. 30, 7 Will. 4 and 1 Vic. c. 88, s. 2; 37 & 38 Vic., c. 35.

128. Piratical acts.—Every one is guilty of an indictable offence and liable to imprisonment for life who, within Canada, does any of the following piratical acts, or who, having done any of the following piratical acts, comes or is brought within Canada without having been tried therefor:—

(*a.*) Being a British subject, on the sea, or in any place within the jurisdiction of the Admiralty of England, under colour of any commission from any foreign prince or state, whether such prince or state is at war with Her Majesty or not, or under pretence of authority from any person whomsoever commits any act of hostility or robbery against other British subjects, or during any war is in any way adherent to or gives aid to Her Majesty's enemies;

(*b.*) Whether a British subject or not, on the sea or in any place within the jurisdiction of the Admiralty of England, enters into any British ship, and throws overboard, or destroys, any part of the goods belonging to such ship, or laden on board the same;

(*c.*) Being on board any British ship on the sea or in any place within the jurisdiction of the Admiralty of England—

(1) Steph. Gen. V. Cr. L. 91, 92.
(2) Grot. 2, c. 18, s. 2.
(3) 4 Inst. 154; Arch. Cr. Pl. & Ev. 21 Ed. 494.

(i.) turns enemy or rebel, and piratically runs away with the ship, or any boat, ordnance, ammunition or goods ;

(ii.) yields them up voluntarily to any pirate :

(iii.) brings any seducing message from any pirate, enemy or rebel ;

(iv.) counsels or procures any persons to yield up or run away with any ship, goods or merchandise, or to turn pirate or to go over to pirates ;

(v.) lays violent hands on the commander of any such ship in order to prevent him from fighting in defence of his ship and goods ;

(vi.) confines the master or commander of any such ship ;

(vii.) makes or endeavours to make a revolt in the ship ; or

(*d.*) Being a British subject in any part of the world, or (whether a British subject or not) being in any part of Her Majesty's dominions or on board a British ship, knowingly—

(i.) furnishes any pirate with any ammunition or stores of any kind ;

(ii.) fits out any ship or vessel with a design to trade with or supply or correspond with any pirate ;

(iii.) conspires or corresponds with any pirate.

129. Piratical acts with violence endangering life.—Every one is guilty of an indictable offence and liable to suffer death who, in committing or attempting to commit any piratical act, assaults with intent to murder, or wounds, any person, or does any act likely to endanger the life of any person.

A foreigner charged with committing an offence within the jurisdiction of the Admiralty of England cannot be tried and punished in any Canadian Court without the leave of the Governor-General. (1)

130. Not fighting pirates.—Every one is guilty of an indictable offence and liable to six months' imprisonment, and to forfeit to the owner of the ship all wages then due to him, who, being a master, officer or seaman of any merchant ship which carries guns and arms, does not, when attacked by any pirate, fight and endeavour to defend himself and his vessel from being taken by such pirate, or who discourages others from defending the ship, if by reason thereof the ship falls into the hands of such pirate.

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(1) See article 542, *post*.

FORMS OF INDICTMENT UNDER TITLE II.

HEADING OF INDICTMENT

In the (*name of Court in which the indictment is found*).

The Jurors for our Lady the Queen present that (*Where there are more Counts than one, add at the beginning of each Count*) :

" The Jurors further present that

STATEMENTS OF OFFENCES.

TREASON.

On at within Her Majesty's Dominions, A, with divers other false traitors to the Jurors aforesaid unknown, and armed arrayed and assembled together in warlike manner, did unlawfully and traitorously levy and make war against our said Lady the Queen, with intent thereby to depose Her Majesty from the style honor and royal name of the Imperial Crown of the United Kingdom of Great Britain and Ireland and of Her other Dominions.

ASSAULT ON THE QUEEN.

A, on at a certain pistol which he the said A in his right hand then had and held, unlawfully and wilfully did point aim and present at (" at or near to.") the person of our Lady the Queen, with intent thereby then and there to alarm our said Lady the Queen.

INCITING TO MUTINY.

A, on at unlawfully and for a traitorous and mutinious purpose did endeavour to seduce one B, he the said B then being a person serving in Her Majesty forces on land, from his duty and allegiance to Her Majesty.

RIOT.

On at A, B, and C, with divers other persons to the Jurors aforesaid unknown, unlawfully riotously and in a manner causing reasonable fear of a tumultuous disturbance of the peace, did assemble together,

and being so assembled together did then and there make a great noise, and thereby began and continued for sometime to disturb the peace tumultuously.

RIOTOUS DESTRUCTION OF BUILDINGS.

A, on at , with two other persons at least, did unlawfully, riotously and tumultuously assemble together to the disturbance of the public peace, and with force did unlawfully demolish and pull down (*or* begin to demolish &c.) a certain building of B.

RIOTOUS DAMAGE TO BUILDINGS.

A, on at , with two other persons at least, did unlawfully, riotously and tumultuously assemble together to the disturbance of the public peace, and with force did unlawfully injure and damage certain machinery of B.

FORCIBLE ENTRY.

A, B, C, and D on unlawfully, forcibly and with a strong hand did enter into a certain dwellinghouse situate and being at and then in the actual and peaceable possession of E, and unlawfully, forcibly and with a strong hand did expel and put out the said E from the said dwellinghouse in a manner likely to cause a breach of the peace.

ADMINISTERING AN UNLAWFUL OATH.

A, on at did unlawfully administer and cause to be administered to B a certain oath and engagement purporting to bind the said B not to inform or give evidence against any associate confederate or other person of or belonging to a certain unlawful association and confederacy; and which said oath and engagement was then and there taken by the said B.

TAKING AN UNLAWFUL OATH.

Commence as above]——did unlawfully take a certain oath and engagement purporting (etc., *as in the last form*); he the said A not being then compelled to take the said oath and engagement.

PIRACY.

A, B, and C on with force of arms upon the high seas, to wit, in and on board a certain ship called the Alabama, in a certain place upon the high seas distant about ten leagues from Baltimore in the United States of America, then being, did in and upon certain mariners to the Jurors aforesaid unknown, then and there being, unlawfully piratically and violently make an assault and them the said mariners put in bodily fear and danger of their lives.

TABLE OF OFFENCES UNDER TITLE II.

INDICTABLE OFFENCES.

No.	Art.	Offence.	Punishment.	Tribunal.
1	65	Treason	Death	Sup. Court Cr. Juris.
2	67	Accessory after fact	Two years	do
3	68	Levying war, etc	Death	Sup. Court Cr. Juris. or Court Martial.
4	69	Treasonable offences	Life	Sup. Court Cr. Juris.
5	70	Conspiracy to intimidate Legislature	Fourteen years	do
6	71	Assaults on Queen	Seven years and whipping	do
7	72	Inciting to mutiny	Life	do
8	73	(1) Enticing soldiers or seamen to desert	Five years	General or Quarter Sessions.
9	77	Unlawfully obtaining official information	One year or $100 fine	Sup. Court Cr. Juris.
10	78	Communication of information by official. If to a foreign State	Life	do
	78	In any other case	One year and $100 fine or both	do
11	81	Unlawful assembly	One year	General or Quarter Sessions.
12	82	Riot	Two years	do
13	83	Opposing Reading Riot Act	Life	do
14	85	Riotous destruction	Life	do
15	86	Riotous damage	Seven years	do
16	87	Unlawful drilling	Two years	do
17	88			
18	89	Forcible entry or detainer	One year	do
19	90	Affray	One year, with hard labor	do
20	91	Challenge to fight	Three years	do
21	98	Inciting Indians to riot	Two years	do
22	99	Causing dangerous explosions	Life	do
23	100	Having explosives	Fourteen years	do
24	101	Making explosives	Seven years	do
25	102	Having arms	Five years	do
26	104	Smugglers carrying arms	Ten years	do
27	113	Refusing to deliver weapon to a justice	Five years	do
28	114	Coming near meeting armed	$100 fine, or 3 months, or both	do
29	115	Lying in wait near meeting	$200 fine or 3 months, or both	do
30	120	Administering or taking oath to commit indictable offence	Fourteen years	Sup. Court Cr. Juris.
31	121	Administering or taking other unlawful oaths	Seven years	do
32	124	Seditious offences	Two years	do
33	125	Libels on foreign sovereigns	One year	do
34	126	Spreading false news	One year	do

Note. It will be understood that with regard to offences mentioned in this table as triable in a Sup. Court of Cr. Juris. those offences cannot be tried in a Court of General or Quarter Sessions, and that with regard to offences mentioned therein as triable in a Court of General or Quarter Sessions, the latter Court has not exclusive jurisdiction over these offences but that in relation to them its jurisdiction is concurrent with that of the Superior Court of Cr. Juris.

(1) No. 8 (Enticing soldiers, etc.) may also be tried summarily. Fine $200 and not less than $80. In default of payment, six months imprisonment.

NON-INDICTABLE OFFENCES.

No.	Art.	Offence.	Punishment.	Tribunal.
1	74	Resisting warrant for deserters	$80 penalty	Summary (Two justices).
2	75	Enticing Militia or Mounted Police men to desert	6 months, with or without hard labor	Summary.
3	93	Challenge to prize-fight	$1,000 fine and not less than $100, or 6 months with or without hard labor or both	do
4	94	Principal in prize-fight	One year, with or without hard labor	do
5	95	Attending prize-fight	$500 fine (not less than $50) or one year, with or without hard labor or both	do
6	96	Leaving Canada for prize fight	$400 fine (not less than $50), or 6 months with or without hard labor.	do
7	97	Fight on a quarrel	Discharge or $50 fine	do
8	103	Openly carrying dangerous weapons.	$40 fine; in default of payment, 30 days	Summary (Two
9	105	Carrying pistol, etc	$25 fine, or one month	Summary. (justices).
10	106	Selling pistol, etc., to minor	$50 fine	do
11	106	Selling pistol, etc., without keeping record	$25 fine	do
12	107	Having weapon when arrested	$50 fine, or 3 months with or without hard labor	Summary (Two
13	108	Having weapon with intent to do injury	$200 fine, or 6 months with or without hard labor	justices). do
14	109	Pointing firearm	$100 fine, or thirty days.	do
15	110	Carrying offensive weapon	$50 fine, or thirty days	do
16	111	Carrying sheath knives	$40 fine, or thirty days	do
17	116	Sale of arms in N.-W. T	$200 fine, or 6 months or both	do
18	117	Possessing weapons near Pub. Works.	$4 fine, each weapon	do
	117	Concealing do do	$100 fine	do
19	118	Selling liquor, etc., near Pub. Works.	1st offence: $40 and costs; and 3 months in default. Every other offence: same penalty and 6 months	do
20	119	Conveying liquors on H. M. Ships	$50 fine; and one month in default	do

LIMITATION OF TIME FOR PROSECUTING OFFENCES UNDER TITLE II.

Art. 65.	Treason,—except (*a*) and (*b*):	3 years.	(See Art. 551 (*a*).
" 69.	Treasonable offence:	3 years.	do
" 83.	Opposing reading Riot Act:	1 year.	(See Art. 551 (*c*).
" 87. } " 88. }	Unlawful drilling:	6 months.	(See Art. 551 (*d*).
" 102.	Having arms:	6 months.	do
Art. 103. } " 105. " 106. " 107. " 108. " 109. " 110. " 111. }	Improper use of offensive weapons:	1 month.	(See Art. 551 (*f*)
" 113.	Refusing to deliver weapon to a justice:	1 year.	(See Art. 551 (*c*).
" 114.	Coming armed near meeting:	1 year.	do
" 115.	Lying in wait near meeting:	1 year.	do

TITLE III.

OFFENCES AGAINST THE ADMINISTRATION OF LAW AND JUSTICE.

PART IX.

CORRUPTION AND DISOBEDIENCE.

131. Judicial corruption.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who—

(*a.*) holding any judicial office, or being a member of Parliament or of a legislature, corruptly accepts or obtains, or agrees to accept, or attempts to obtain for himself or any other person, any money or valuable consideration, office, place, or employment on account of anything already done or omitted, or to be afterwards done or omitted, by him in his judicial capacity, or in his capacity as such member ; or

(*b.*) corruptly gives or offers to any such person or to any other person, any such bribe as aforesaid on account of any such act or omission.

No prosecution for any offence under this article can be instituted without the leave of the Attorney-General of Canada. (1)

In reference to the offences dealt with under the present title the Royal Commissioners, in their report on the English draft code, say, "Title III deals with "offences affecting the administration of juctice, by way of corrupting judicial "or ministerial officers, by disobeying lawful orders, by deceiving courts, by "perjury and other means of the same kind, or by escaping or rescuing others "from lawful custody. In a general code of the criminal law we have thought "it right to include the offence of judicial corruption, and to subject it to severe "and infamous punishment. As no case of the kind has occurred (if we "except the prosecutions of Lord Bacon and Lord Macclesfield), it is not sur- "prising that the law on the subject should be somewhat vague. We have "thought it right in order to protect persons holding judicial positions from "malicious prosecutions to provide that no prosecution for this offence shall be "instituted except by the attorney general."

132. Corruption of officers employed in prosecuting offenders.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who—

(*a.*) being a justice of the peace, peace officer, or public officer, employed in any capacity for the prosecution or detection or punishment of offenders, corruptly accepts or obtains, or agrees to

(1) See article 544, *post.*

accept or attempts to obtain for himself, or for any other person, any money or valuable consideration, office, place or employment, with the intent to interfere corruptly with the due administration of justice, or to procure or facilitate the commission of any crime, or to protect from detection or punishment any person having committed or intending to commit any crime ; or

(*b.*) corruptly gives or offers to any such officer as aforesaid any such bribe as aforesaid with any such intent.

Under article 3 (*s*) "PEACE OFFICER includes a mayor warden, reeve, sheriff, "deputy sheriff, sheriff's officer, and justice of the peace, and also the warden, "keeper or guard of a penitentiary, and the gaoler or keeper of any prison, and "any police officer, police constable, bailiff, constable, or other person employed "for the preservation and maintenance of the public peace, or for the service "or execution of civil process."

Under article 3 (*w*), "PUBLIC OFFICER includes any inland revenue or customs "officer, officer of the army, navy, marine, militia, North-west mounted police or "other officer engaged in enforcing the laws relating to the revenue, customs, "trade or navigation of Canada."

133. Frauds upon the Government.—Every one is guilty of an indictable offence and liable to a fine of not less than one hundred dollars, and not exceeding one thousand dollars, and to imprisonment for a term not exceeding one year and not less than one month, and in default of payment of such fine to imprisonment for a further time not exceeding six months who—

(*a.*) makes any offer, proposal, gift, loan, or promise, or who gives or offers any compensation or consideration, directly or indirectly, to any official or person in the employment of the Government, *or to any member of his family, or to any person under his control, or for his benefit,* with intent to obtain the assistance or influence of such official or person to promote either the procuring of any contract with the Government, for the performance of any work, the doing of any thing, or the furnishing of any goods, effects, food or materials, the execution of any such contract, or the payment of the price, or consideration stipulated therein, or any part thereof, or of any aid or subsidy, payable in respect thereof; or

(*b.*) being an official or person in the employment of the Government, directly or indirectly, accepts or agrees to accept or allows to be accepted by any person under his control, or for his benefit, any such offer, proposal, gift, loan, promise, 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 a Parliament, or with the intent in any way of influencing or affecting the result of a provincial or Dominion election.

2. *If the value* of the amount or thing paid, offered, given, loaned, promised, received or subscribed, as the case may be, *exceeds one thousand dollars*, the offender under this section is liable to any fine not exceeding such value.

3. The words "the Government" in this section include the Government of Canada and the Government of any province of Canada, as well as Her Majesty in the right of Canada or of any province thereof.

No prosecution for any offence under this article can be commenced after the expiration of two years from its commission. (1)

The provisions of this and the next article are almost wholly taken from 54-55 Vict., c. 23.

134. Other consequences.—Every person convicted of an offence under the next preceding section shall be incapable of contracting with the Government, or of holding any contract or office with, from, or under it, or of receiving any benefit under any such contract. R. S. C., c. 173, ss. 22 and 23.

135. Breach of trust by public officer.—Every public officer is guilty of an indictable offence and liable to five years' 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.

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

(1) See article 551 (*b*), *post*.

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 any offence under this article can be commenced after the expiration of two years from its commission. (1)

137. Selling office, appointment, &c.—Every one is guilty of an indictable offence who, directly or indirectly—

(*a.*) sells or agrees to sell any appointment to or resignation of any office, or any consent to any such appointment or resignation, or receives, or agrees to receive, any reward or profit from the sale thereof ; or

(*b.*) purchases or gives any reward or profit for the purchase of any such appointment, resignation or consent, or agrees or promises to do so.

Every one who commits any such offence as aforesaid, in addition

(1) See article 551 (*b*), *post*.

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 negociation ; or

(*b.*) gives or procures to be given any profit or reward, or makes or procures to be made any agreement for the giving of any profit or reward, for any such interest, request or 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.

A person convicted of an offence under this article is liable to five years imprisonment. (1)

138. Disobedience to a Statute.—Every one is guilty of an indictable offence and liable to one year's imprisonment who, without lawful excuse, disobeys any Act of the Parliament of Canada or of any legislature in Canada, by wilfully doing any act which it forbids, or omitting to do any act which it requires to be done, unless some penalty or other mode of punishment is expressly provided by law.

139. Disobedience of orders of court.—Every one is guilty of an indictable offence and liable to one year's imprisonment who, without lawful excuse, disobeys any lawful order other than for the payment of money made by any court of justice, or by any person or body of persons authorized by any statute to make or give such order, unless some penalty is imposed, or other mode of proceeding is expressly provided, by law.

140. Neglect of peace officer to suppress riot.—Every one is guilty of an indictable offence and liable to two years' imprisonment who, being a sheriff, deputy-sheriff, mayor, or other head officer, justice of the peace, or other magistrate, or other peace officer, of any county city, town, or district, having notice that there is a riot within his

(1) See article 951 *post*.

jurisdiction, without reasonable excuse omits to do his duty in suppressing such riot.

See comments under article 84, *ante* p. 53.

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.

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 in executing writs.—Every one is guilty of an indictable offence and liable to a fine and imprisonment who, being a sheriff, deputy-sheriff, coroner, elisor, bailiff, constable or other officer entrusted with the execution of any writ, warrant or process, wilfully misconducts himself in the execution of the same or wilfully, and without the consent of the person in whose favour the writ, warrant or process was issued, makes any false return thereto. R.S.C., c. 173, s. 29.

Under the terms of article 951, *post*, the length of imprisonment to which an offender against article 143 is liable is five years, and under article 934, *post*, the amount of the fine is in the discretion of the court or person passing sentence.

144. Obstructing public or peace officer in execution of his duty.—Every one is guilty of an indictable offence and liable to ten years' imprisonment who resists or wilfully obstructs any *public officer* in the execution of his duty or any person acting in aid of such officer.

2. Every one is guilty of an offence and liable on indictment to two years' imprisonment, and on summary conviction before two justices of the peace to six months' imprisonment with hard labour, or to a fine of one hundred dollars, who resists or wilfully obstructs—

(*a.*) any *peace officer* in the execution of his duty or any person acting in aid of any such officer;

(*b.*) any person in the lawful execution of any process against any lands or goods or in making any lawful distress or seizure. R.S.C., c. 162, s. 34.

For the distinction between "*public officer*" and "*peace officer*," see article 3 (*s*) and 3 (*w*), *ante* p. 5.

PART X.

MISLEADING JUSTICE.

145. Perjury.—Perjury is an assertion as to a matter of fact, opinion, belief or knowledge, made by a witness in a judicial proceeding as part of his evidence, upon oath or affirmation, whether such evidence is given in open court, or by affidavit or otherwise, *and whether such evidence is material or not*, such assertion being known to such witness to be false, and being intended by him to mislead the court, jury, or person holding the proceeding. Evidence in this section includes evidence given on the *voir dire* and evidence given before a grand jury.

2. Every person is a witness within the meaning of this section 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 authorised 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 authorise it or him to hold the proceeding, *and although such proceeding was held in a wrong place or was otherwise invalid*

4. Subornation of perjury is counselling or procuring a person to commit any perjury which is actually committed.

146. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who commits perjury or subornation of perjury.

2. If the crime is committed in order to procure the conviction of a person for any crime punishable by death, or imprisonment for seven years or more, the punishment may be imprisonment for life R.S.C., c. 154, s. 1.

See article 221, *post.*

The Royal Commissioners say that, in framing the section of their draft code relating to perjury, they proceeded on the principle that the guilt and danger of perjury consist in attempting by falsehood to mislead a tribunal *de facto* exercising judicial functions and that it seemed to them "not desirable that a "person who has done this should escape from punishment, if he can shew some "defect in the constitution of the tribunal which he sought to mislead, or some "error in the proceedings themselves."

The words "*and whether such evidence is material or not,*" forming part of the first paragraph of the above article do not appear in the corresponding section of the English Draft Code; and our law is thus made in positive terms, altogether different, on this point, from the law of England, under which the false swearing, to constitute perjury, must not only be in a judicial proceeding before a competent tribunal, but the evidence, or that part of it which is charged as false, must have been material to the matter which at the time of the swearing was in issue in such judicial proceeding. (1)

On this point a good deal of discussion took place in the Committee of the House of Commons at Ottawa. (See Extra Appendix *post*).

The effect of the above article, 145, seems to be to make it perjury to swear or affirm, in any judicial proceeding, (valid or invalid), to any verbal or written statement of a matter of fact, opinion, belief or knowledge, whether material, or admissable, or not, and which the deponent or affirmant knows to be false, and is intended by him to mislead justice.

The false statement to constitute perjury under this article must be sworn or affirmed in some judicial proceeding. False oaths, affirmations and solemn declarations, taken or made in other matters than judicial proceedings, are dealt with under article 147. See also the special provisions of article 148, (*post*).

With regard to false evidence in judicial proceedings the following are some instances of those who have been held guilty or not guilty of perjury in that respect:—

ILLUSTRATIONS.

It has been held that one commits perjury,—

(*a.*) who makes, in any, civil or criminal case, a false affidavit upon oath or affirmation in support of a plea; or in support of a motion for new trial; or in aid of a petition for a writ of *habeas corpus*; or in support of an information or complaint charging a criminal offence against another to procure his arrest; (2)

(*b.*) who being offered as bail or other surety swears or affirms falsely so as to qualify himself; (3)

(*c.*) who, as a juror, swears falsely as to his competency; (4)

A proceeding before a local marine board sitting under the Merchants Shipping Act 1854 and having power to suspend or cancel the certificates of the masters and mates of ships has been held to be a judicial proceeding. (5)

The administering of an oath by a returning officer to a voter at a civic election has been held not to be a judicial proceeding. (6)

The offence of perjury cannot be founded on a mere oath of office, Hawkins says, "The notion of perjury is confined to such public oaths only as affirm or "deny some matter of fact contrary to the knowledge of the party, and "therefore it doth not extend to any promissory oaths whatsoever. From which "it clearly follows that no officer public or private who neglects to execute his "office, in pursuance of his oaths, or acts contrary to the purport of it, is "indictable for perjury in respect of such oath; yet it is certain that his offence "is highly aggravated by being contrary to his oath, and therefore that he is "liable to the severer fine on that account." (7)

Oaths and affirmations.— "An oath has been defined to be a person's "solemn asseveration, uttered in an appeal to the Supreme Being under the

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(1) R. v. Townsend, 10 Cox, 356; Arch. Cr. Pl. and Ev., 21 Ed. 934.
(2) S. v. Roberts, 11 Humph. 539; S. v. Chandler, 42 Vt. 446; White v. S. 1 Sm. & M. 149; Pennaman v. S., 58 Ga. 336.
(3) C. v. Hatfield, 107 Mass. 227.
(4) C. v. Stockley, 10 Leigh 678.
(5) R. v. Tomlinson, L. R. 1 C. C. R. 49.
(6) Thomas v. Platt, 1 U. C., Q. B. 217; Burbridge Dig. Cr. L. 134, 135.
(7) 1 Hawk. P. C. Curw. Ed. p. 431.

"sanction of his religion, that a thing stated or to be stated by him is true, "made to a civil officer authorised to receive it; and an affirmation is a modern "statutory device whereby those whose consciences are offended by such an "appeal to God place themselves without it in the like civil position with those "who have taken the oath. It is similar to the oath but omits the appeal to the "Deity, and substitutes the word 'affirm' for the word 'swear.'" (1)

Under the Canada Evidence Act 1893 secs. 23 and 24, (2) a witness who objects, on grounds of conscientious scruples, to take an oath may, instead of being sworn, solemnly affirm to tell the truth; and his evidence is to have the same effect and render him liable to the same punishment for perjury as if he were sworn.

Proof.—The proof necessary to convict a person accused of having committed perjury must necessarily be something more than the evidence of a single, witness; or it would be simply one oath against another, and therefore where there is only one witness to swear to the falsity of the statement charged as perjury the evidence of that one witness must be confirmed by proof of circumstances strongly corroborating it, as for instance, by the production and proof of a letter written by the accused contradicting his sworn testimony in question. Article 684 provides that the evidence of one witness shall not be sufficient to convict "unless such witness is corroborated in some material particular by "evidence implicating the accused." (3)

The material particular in which corroboration is necessary is the falsity of the statement alleged as the perjury. The other facts such as the judicial proceeding in which the statement in question was sworn to or affirmed, the administering and taking of the oath or affirmation, and the making of the statement under oath or affirmation may be proved in the same manner and by the same evidence as in any ordinary case.

If in two causes, or in one at different examinations, or at one examination, a witness swears to two opposite and irreconcilable things he commits perjury by that one, of the two statements, which is false but not by that one which is true. And though what he said when he told the truth may be shewn in evidence against him on an indictment for the false statement, still there must be testimony over and above his own contradictory statements as to which of them is false. (4)

Perjury is committed only where there is the intent to testify falsely; and where professional advice is honestly acted upon it may negative this intent. Thus, where a lawyer reduces a man's *oral* statement to *writing* and the latter having confidence in the former swears to the writing under the impression that it does not differ in meaning from the oral words, there is no perjury, though in fact it does differ and is wrong. (5) And if through a mistake of one who draws up an affidavit or through a misreading of it to the deponent, or from any other cause the latter in good faith believes its contents to be what they are not, he does not become a perjurer by swearing to a falsehood therein, while understanding it to be something else which is true. (6)

If a man swears to a thing of which consciously he knows nothing, he commits perjury; for the declaration of a witness is that he knows the truth of what he says,—that is, that it is to his knowledge that what he says is true,—and if he is really conscious that he does not know it he means to swear falsely. (7)

Section 4 of the R. S. C., c. 154, is unrepealed, and is as follows:

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(1) 2 Bish. New Cr. L. Com. s. 1018.
(2) See The Canada Evidence Act 1893, *post*.
(3) See Article 684 *post*.
(4) Reg. v. Hughes, 1 Car & K. 519.
(5) U. S. v. Stanley, 6 McLean, 409; U. S. v. Conner, 3 McLean, 583; 2 Bish. Cr. L Com., s 1046.
(6) Jesse v. S., 20 Ga. 156, 169.
(7) Byrnes v. Byrnes. 102 N. Y. 4, 9.

"**4.** Any judge of any court of record, or any commissioner before whom any inquiry or trial is held, and which he is by law required or authorized to hold, may, if it appears to him that any person has been guilty of wilful and corrupt perjury in any evidence given, or in any affidavit, affirmation, declaration, deposition, examination, answer or other proceeding made or taken before him, direct such person to be prosecuted for such perjury, if there appears to such judge or commissioner a reasonable cause for such prosecution,—and may commit such person so directed to be prosecuted until the next term, sittings or session of any court having power to try for perjury, in the jurisdiction within which such perjury was committed, or permit such person to enter into a recognizance, with one or more sufficient sureties, conditioned for the appearance of such person at such next term, sittings or session, and that he will then surrender and take his trial and not depart the court without leave,—and may require any person, such judge or commissioner thinks fit, to enter into a recognizance conditioned to prosecute or give evidence against such person so directed to be prosecuted as aforesaid."

147. False oaths.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who, being required or authorized by law to make any statement on oath, affirmation or solemn declaration, thereupon makes a statement which would amount to perjury if made in a judicial proceeding.

See remarks under articles 145 and 146.

148. Other false oaths.—Every one is guilty of perjury who—

(*a.*) having taken or made any oath, affirmation, solemn declaration or affidavit where by any Act or law in force in Canada, or in any province of Canada, it is required or permitted that facts, matters or things be verified, or otherwise assured or ascertained 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.

149. False oath made out of a province.—Every person who wilfully and corruptly makes any false affidavit, affirmation or solemn declaration, out of the province in which it is to be used but within Canada, before any person authorized to take the same, for the purpose of being used in any province of Canada, is guilty of perjury in like manner as if such false affidavit, affirmation or decla-

ration were made before a competent authority in the province in which it is used or intended to be used. R.S.C., c. 154, s. 3.

150. False statements.—Every one is guilty of an indictable offence and liable to two years' imprisonment who, upon any occasion on which he is permitted by law to make any statement or declaration before any officer authorised by law to permit it to be made before him, or before any notary public to be certified by him as such notary, makes a statement which would amount to perjury if made on oath in a judicial proceeding.

In reference to this provision the English Commissioners say:

"It may be doubtful whether this is at present even a common law misdemeanor; but we feel no doubt that it ought to be made indictable."

151. Fabricating evidence.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who, with intent to mislead any court of justice or person holding any such judicial proceeding as aforesaid, fabricates evidence by any means other than perjury or subornation of perjury.

"Fabricating evidence is an offence which is not so common as perjury, but "which does occur and is sometimes detected. An instance occurred a few "years ago on a trial for shooting at a man with intent to murder him, when "the defence was that though the accused did fire off a pistol, it was not loaded "with ball, and the only intent was to frighten. Evidence was given that a "pistol ball was found lodged in the trunk of a tree nearly in the line from "where the accused fired to where the prosecutor stood. It was afterwards "discovered that the ball had been placed in the tree by those concerned in the "prosecution, in order to supply the missing link in the evidence. Such an "offence is as wicked and as dangerous an offence as perjury, but the punishment "as a common law offence, (if irrespective of conspiracy, it be an offence), is "only fine and imprisonment." Royal Commissioners' Report.

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.

The following sections (26 and 27) of *The Canada Evidence Act* 1893 shew the present law relating to extra-judicial oaths:

"Any judge, notary public, justice of the peace, police or stipendiary magistrate, recorder, mayor, commissioner authorised to take affidavits to be used either in the Provincial or Dominion Courts, or any other functionary authorised 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."

"Any affidavit, affirmation or declaration required by any insurance company, authorised 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 authorised to take affidavits, or before any justice of the peace or before any notary public for any province of Canada; and any such officer is bereby required to take such affidavit, affirmation or declaration."

SCHEDULE A.

"I. A., B., do solemnly declare that (*state the fact or facts declared to*), and I make this solemn declaration conscientiously believing the same to be true, *and knowing that it is of the same force and effect as if made under oath* and by virtue of *The Canada Evidence Act*, 1893.

Declared before me

at this day of

A. D., 18 ."

154. Corrupting juries and witnesses.—Every one is guilty of an indictable offence and liable to two years' imprisonment who—

(*a.*) dissuades or attempts to dissuade any person by threats, bribes or other corrupt means from giving evidence in any cause or matter, civil or criminal; or

(*b.*) influences or attempts to influence, by threats or bribes or other corrupt means, any juryman in his conduct as such, whether such person has been sworn as a juryman or not; or

(*c.*) accepts any such bribe or other corrupt consideration to abstain from giving evidence, or on account of his conduct as a juryman ; or

(*d.*) wilfully attempts in any other way to obstruct, pervert or defeat the course of justice. R.S.C., c. 173, s. 30.

Embracery.—Sub-section (*b*) covers a common law offence called embracery. Some of the old English statutes against embracery are the 5 Edward 3, c. 10,—entitled "The punishment of a Juror that is Ambidexter and taketh money"; the 34 Edward 3, c. 8,—entitled, "The Penalty of a Juror taking reward to give "his verdict"; the 38 Edw. 3, stat. 1, c. 12,—entitled "The punishment of a "Juror taking reward to give verdict and of Embracers"; and the 32 Hen. 8, c. 9,—entitled "The Bill of Bracery and Buying of Titles." The preamble to this statute says, "that there is nothing within this realm that conserveth the "king's loving subjects in more quietness, rest, peace and good concord than the "due and just ministration of his laws and the true and indifferent trials of such "titles and issues as have to be tried according to the laws of the realm; which "his most royal majesty perceiveth to be greatly hindered by maintenance, "embracery, champerty, subornation of witnesses, sinister labor, buying of "titles and pretensed rights of persons not being in possession; whereupon "great perjury hath ensued, and much inquietness, oppression, vexation, "troubles, wrongs and disinheritance." The statute then goes on to enact, among other things, "that from henceforth all statutes heretofore made con-"cerning maintenance, champerty and embracery shall be put in due execution: "and that no person do hereafter unlawfully retain, for maintenance of any suit "or plea, any person or persons, or embrace any freeholders or jurors."

An old law dictionary contains the following description of the offence, "*Embraceor*. He that when a matter is in trial between party and party comes "to the bar with one of the parties, having received some reward so to do and "speaks in the case, or privately labors the jury, or stands in the court to survey "or overlook them, whereby they are awed or influenced or put in fear or doubt "of the matter. But lawyers, attorneys, etc., may speak in the case for their "clients, and not be embraceors. (1) If the party himself instructs a juror or "promises any reward for his appearance then the party is likewise an "embraceor. And a juror may be guilty of embracery when he by indirect "practices gets himself sworn on the *tales* to serve on one side."

Blackstone defines embracery as "an attempt to influence a jury corruptly "to one side by promises, persuasions, entreaties, money, entertainments, and "the like." (2) And Hawkins says, "It seems clear that any attempt whatso-"ever to corrupt or influence or instruct a jury, or any way to incline them to "be more favorable to the one side than the other, by money, promises, letters, "threats or persuasions, except only by the strength of the evidence and the "arguments of counsel in open court at the trial of the cause, is a proper act of "embracery; whether the jurors on whom such attempt is made give any verdict "or not, or whether the verdict given be true or false." (3)

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.

This article applies to *qui tam* actions.

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(1) Co. Lit., 369; 1 Hawk. P. C. Curw. ed. p. 467, s. 4,
(2) 4 Bl. Com. 140.
(3) 1 Hawk. P. C. Curw. ed. p. 466, s. 1.

In reference to this offence Blackstone says that the Statute of 18 Eliz., c. 5. provided "that if any person informing under pretense of any penal law, makes "any composition without leave of the court or takes any money or promise "from the defendant to excuse him (which demonstrates his intention of com- "mencing the prosecution to be merely to serve his own ends, and not for the "public good), he shall forfeit £10, shall stand two hours in the pillory, and "shall be for ever disabled to sue on any popular or penal statute." (1)

With regard to compounding misdemeanors, Blackstone says, "It is not un- "common when a person is convicted of a misdemeanor which principally and "more immediately affects some individual, as a battery, imprisonment, or the "like, for the court to permit the defendant *to speak with his prosecutor* before "any judgment is pronounced; and if the prosecutor declares himself satisfied, "to inflict but a trivial punishment."

156. Corruptly taking reward for helping to recover stolen property.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who corruptly takes any money or reward directly or indirectly, under pretense or upon account of helping any person to recover any chattel, money, valuable security or other property which, by any indictable offence has been stolen, taken, obtained, extorted, converted or disposed of, unless he has used all due diligence to cause the offender to be brought to trial for the same. R.S.C., c. 164, s. 89.

See Article 3 (*cc.*), *ante* p. 6, for the meaning of "valuable security."

In Archbolds Crim. Pleading and Evidence 21st ed. (1893) the following authorities amongst others, are cited at pages 185, 186, 955 and 956, as to compounding offences (felonies and misdemeanors); R. v. Burgess, 16 Q. B. D. 141; 55 L. J. (M. C.) 97; R. v. Stone, 4 C. and P. 379; R. v. Gatley, R. and R. 84, R. v. Crisp., 1 B. and Ald. 282; R. v. Best 2 Mood, C. C. 125; 9 C. D. P. 368; Kerr. v. Leeman, 6 Q. B. 308; 13 L. J. (Q. B.) 359; in Ex. Ch. 9 Q. B. 371; 15 L. J. (Q.B.) 360; and Windhill Local Board of Health v. Vint, 45 Ch. D. 351. In the latter case, the plaintiffs, a local board, had indicted the defendants for obstructing a highway. At the trial of the indictment a compromise was made by the parties and sanctioned by the judge, and afterwards confirmed by deed. By this deed the defendants covenanted to restore the road within seven years, and the plaintiffs covenanted that when that had been done they would consent to a verdict of "not guilty" on the indictment. The defendants failed to restore the road, and the plaintiffs then brought an action on their covenant. It was held by the Court of Appeal affirming the judgment of *Stirling* J. that as the indictment was for a public injury, the agreement to consent to a verdict of "not guilty" was illegal, and that the plaintiffs could not maintain an action on the defendants' covenant.

This case and the other authorities above referred to, shew that when an offence,—even if it be not very serious,—is one of a public nature, the compromise of a prosecution based upon it will be illegal; but it appears that if the offence is of a light character and one which might be made the subject of a civil action, such as a common assault or a libel, an agreement to withdraw the prosecution will be legal; but where the public characteristic of the offence predominates, as for instance, in the case of an assault and riot combined, an agreement to compromise the prosecution would be illegal.

157. Unlawfully advertising reward for return of stolen property.—Every one is liable to a penalty of two hundred and fifty dollars for each offence, recoverable with costs by any person who sues for the same in any court of competent jurisdiction, who—

(1) 4 Bl. Com. 136.

(*a.*) publicly advertises a reward for the return of any property which has been stolen or lost, and in such advertisement uses any words purporting that no questions will be asked ; or

(*b.*) makes use of any words in any public advertisement purporting that a reward will be given or paid for any property which has been stolen or lost, without seizing or making any inquiry after the person producing such property ; or

(*c.*) promises or offers in any such public advertisement to return to any pawnbroker or other person who advanced money by way of loan on, or has bought, any property stolen or lost, the money so advanced or paid, or any other sum of money for the return of such property ; or

(*d.*) prints or publishes any such advertisement. R.S.C., c. 164, s. 90.

The time within which a prosecution for an offence under (*d*) may be commenced is limited to six months. (1)

158. Signing false declaration of execution of judgment of death.—Every one is guilty of an indictable offence and liable to two years' imprisonment, who knowingly and wilfully signs a false certificate or declaration when a certificate or declaration is required with respect to the execution of judgment of death on any prisoner. R. S. C., c. 181, s. 19.

PART XI.

ESCAPES AND RESCUES.

"In reference to the somewhat intricate subject of escape and rescue we have "made distinctions, which are, we think, insufficiently recognised by the existing "law, between the commission of such offences by peace officers and gaolers, "and by other persons." Royal Commissioners' Report.

159. Being at large while under sentence of imprisonment.—Every one is guily of an indictable offence and liable to two years' imprisonment who, having been sentenced to imprisonment, is afterwards, and before the expiration of the term for which he was sentenced, at large within Canada without some lawful cause, the proof whereof shall lie on him.

160. Assisting escape of prisoners of war.—Every one is guilty of an indictable offence and liable to five years' imprisonment who knowingly and wilfully—

(*a.*) assists any alien enemy of Her Majesty, being a prisoner of

(1) See article 551 (*d*) *post*.

war in Canada, to escape from any place in which he may be detained ; or

(*b*.) assists any such prisoner as aforesaid, suffered to be at large on his parole in Canada or in any part thereof, to escape from the place where he is at large on his parole.

161. Breaking prison—Every one is guilty of an indictable offence and liable to seven years' imprisonment who, by force or violence breaks any prison with intent to set at liberty himself or any other person confined therein on any criminal charge.

162. Attempting to break prison.—Every one is guilty of an indictable offence and liable to two years' imprisonment who attempts to break prison, or who forcibly breaks out of his cell, or makes any breach therein with intent to escape therefrom. R. S. C., c. 155, s. 5.

By article 3 (*u*), "prison" includes any penitentiary, common gaol, public or reformatory prison, lock-up, guard-room, or other place in which persons charged with the commission of offences are usually kept or detained in custody.

Prison breach.—Under article 161 prison breach is forcibly or violently breaking a prison either by a prisoner confined therein, on a criminal charge, with intent to release himself, or by a third person with intent to release any such prisoner.

If a prisoner confined in prison on a criminal charge climbs over the prison wall, and so sets himself at liberty, this is not a prison breach under the terms of article 161 ; but it would be punishable as an escape, under, article 163 ; and where, in getting over the wall the escaping prisoner disturbed and threw down some loose bricks it was held a prison-breaking. (1)

Under article 161 the forcible breaking with intent to escape seems to be sufficient to constitute the offence. It does not seem necessary that the prisoner should succeed in regaining his liberty.

To constitute a prison breach as distinguished from a mere escape the prison must be broken, or there must be real force or violence used when the escape is made or attempted. Therefore, if without any obstruction, a prisoner go out of the prison doors, they being opened by the consent or negligence of the gaoler, or if he otherwise escape, without using any kind of force or violence, he will not be guilty of any thing more than an escape (2). In Haswell's case the prisoner, who was convicted of horse stealing, made his escape from the house of correction by tying two ladders together and placing them against the wall of the yard, on the top of which wall was a range of bricks placed loose and without mortar, some of which were thrown down by the prisoner (it was supposed accidentally), in getting over the wall. Mr. Baron Wood doubted whether there was such force used as to constitute the crime of prison-breaking or whether it amounted to only an escape ; and the point being reserved, the judges were unanimously of opinion that it was a prison-breaking. (3)

Escapes and Rescues.—In law an escape has two separate meanings. The one is the going away by the prisoner himself from lawful custody or imprisonment, without any prison-breaking and without any force or violence ; and the other where the officer having lawful charge of a prisoner voluntarily allows him to leave and go free from his place of confinement. (See subsection (*b*) of articles 165 and 166).

(1) R. v. Haswell, R. and R. 458 ; Burbridge, Dig. Cr. L. 143.
(2) 1 Hale 611 ; 2 Hawk. c. 18, s. 9.
(3) R. v. Haswell, R. and R. 458.

Under the terms of sub-section (*a*) of articles 165 and 166, a rescue is the deliverance of a prisoner from lawful custody by a third person, or assistance rendered by a third person to any prisoner in escaping or attempting to escape from lawful custody.

163. Escape from custody or from prison.—Every one is guilty of an indictable offence and liable to two years' imprisonment who—

(*a.*) having been convicted of any offence, escapes from any lawful custody in which he may be under such conviction ; or

(*b.*) whether convicted or not, escapes from any prison in which he is lawfully confined on any criminal charge.

164. Every one is guilty of an indictable offence and liable to two years' imprisonment who being in lawful custody other than as aforesaid on any criminal charge, escapes from such custody.

165. Assisting to escape.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who—

(*a.*) rescues any person or assists any person in escaping, or attempting to escape, from lawful custody, whether in prison or not, under sentence of death or imprisonment for life, or after conviction of, and before sentence for, or while in such custody upon a charge of any crime punishable with death or imprisonment for life ; or

(*b.*) being a peace officer and having any such person in his lawful custody, or being an officer of any prison in which any such person is lawfully confined, voluntarily and intentionally permits him to escape therefrom.

166. Every one is guilty of an indictable offence and liable to five years' imprisonment who—

(*a.*) rescues any person, or assists any person in escaping or attempting to escape, from lawful custody, whether in prison or not, under a sentence of imprisonment for any term less than life, or after conviction of, and before sentence for, or while in such custody upon a charge of any crime punishable with imprisonment for a term less than life ; or

(*b.*) being a peace officer having any such person in his lawful custody, or being an officer of any prison in which such person is lawfully confined, voluntarily and intentionally permits him to escape therefrom.

167. Every one is guilty of an indictable offence and liable to two years' imprisonment who with intent to facilitate the escape of any prisoner lawfully imprisoned conveys, or causes to be conveyed, anything into any prison.

168. Unlawfully procuring a prisoner's discharge.—Every one is guilty of an indictable offence and liable to two years' imprisonment, who knowingly and unlawfully, under colour of any pretended authority, directs or procures the discharge of any prisoner not

entitled to be so discharged, and the person so discharged shall be held to have escaped. R.S.C., c. 155, s. 8.

169. Punishment of escaped prisoner.—Every one who escapes from custody, shall, on being retaken, serve, in the prison to which he was sentenced, the remainder of his term unexpired at the time of his escape, in addition to the punishment which is awarded for such escape; and any imprisonment awarded for such offence may be to the penitentiary or prison from which the escape was made. R.S.C., c. 155, s. 11.

Section 1 of 53 Vict., chap. 37 has not been repealed, and contains the following additional provisions in reference to escapes:—

"Every one who, being sentenced to imprisonment or detention in, or being ordered to be detained in, any reformatory prison, reformatory school, industrial refuge, industrial home or industrial school, escapes or attempts to escape therefrom, is guilty of a misdemeanour, and may be dealt with as follows:—

"The offender may, at any time, be apprehended without warrant and brought before any magistrate, who, upon proof of his identity,—

"(*a*) In the case of an escape or attempt to escape from a reformatory prison or a reformatory school, shall remand him thereto for the remainder of his original term of imprisonment or detention; or,—

"(*b*.) In the case of an escape or attempt to escape from an industrial refuge, industrial home or industrial school,—

"(i.) May remand him thereto for the remainder of his original term of imprisonment or detention; or

"(ii.) If the officer in charge of such refuge, home or school certifies in writing that the removal of such offender to a place of safer or stricter imprisonment is desirable, and if the governing body of such refuge, home or school applies for such removal, and if sufficient cause therefor is shown to the satisfaction of such magistrate, may order the offender to be removed to and to be kept imprisoned, for the remainder of his original term of imprisonment or detention, in any reformatory prison or reformatory school, in which by law such offender may be imprisoned for a misdeameanour,—and when there is no such reformatory prison or reformatory school, may order the offender to be removed to and to be so kept imprisoned in any other place of imprisonment to which the offender may be lawfully committed;

"(*c*.) And in any case mentioned in the preceding paragraphs (*a*) and (*b*) of this subsection, or if the term of his imprisonment or detention has expired, the magistrate may, after conviction, sentence the offender to such additional term of imprisonment or detention, as the case may be, not exceeding one year, as to such magistrate seems a proper punishment for the escape or attempt to escape."

FORMS OF INDICTMENT UNDER TITLE III.

HEADING OF INDICTMENT. (1)

In the (*name of the Court in which the indictment is found*).

The Jurors for our Lady the Queen present that (*Where there are more counts than one, add at the beginning of each count*) :

"The said Jurors further present that

STATEMENTS OF OFFENCES.

NEGLECT TO SUPPRESS RIOT.

On at the City of within the jurisdiction of A, then being the Mayor of and present in the said City of there was a riot, and the said A, then having notice thereof, unlawfully and without any reasonable excuse did then and there omit to do his duty as such Mayor in suppressing the said riot.

OMITTING TO AID PEACE OFFICER IN SUPPRESSING RIOT.

On at the City of there was a riot, and that A. B, and C. then and there present, being called upon and requested by D. a peace officer in the exercise of his duty in that behalf to render him their assistance in suppressing the said riot, did unlawfully and without any reasonable excuse then and there refuse and omit to do so.

PERJURY.

A. committed perjury with intent to procure the conviction of B. for an offence punishable with imprisonment for more than seven years, namely robbery, by swearing on the trial of B. for the robbery of C. at the Court of Quarter Sessions for the county of on the day of 18 ; first, that he, A. saw B. at on the day of ; secondly, that B. asked A. to lend B. money on a watch belonging to C. ; thirdly, &c.

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(1) See as to requisites of indictment, Articles 608 to 619 inclusive.

PERJURY.

A. committed perjury on the trial of B. at a Court of Quarter Sessions held at on for an assault alleged to have been committed by the said B. on C. at Toronto on the day of by swearing to the effect that the said B. could not have been at Toronto at the time of the alleged assault, inasmuch as the said A. had seen him at that time in Port Arthur.

SUBORNATION OF PERJURY.

Same as last form to the end, and then proceed :—

And the jurors aforesaid further present, that before the committing of the said perjury by the said A. to wit, on the day of , at , C. unlawfully, did counsel and procure the said A. to do and commit the said perjury.

TAKING REWARD FOR HELPING TO RECOVER STOLEN PROPERTY.

On, at A did unlawfully and corruptly take and receive dollars as a reward for and under pretence and on account of helping to recover a certain piano, (*or* twenty dollars in money, *or* a promissory note, *or* a horse), belonging to and theretofore stolen from the said B. (*or as the case may be*), the said A not having used all due diligence to bring to trial for such theft the person who committed it.

BREAKING PRISON.

On the day of at A. being then a prisoner confined in the common gaol or prison in and for the county of on a criminal charge, did unlawfully, by force and violence, break the said gaol or prison, by then and there cutting and sawing two iron bars of the said gaol or prison and by also then and there breaking, cutting and removing a quantity of stone, parcel of the wall of the gaol or prison aforesaid, with intent thereby, then and there, to set himself, the said A., at liberty

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TABLE OF OFFENCES UNDER TITLE III.

INDICTABLE OFFENCES. (1)

No.	Art.	Offence.	Punishment.	Tribunal.
1	131	Corruption of Judges and Legislators	Fourteen years	Sup. Court Cr. Juris.
2	132	Corruption of officers of justice	Fourteen years	do
3	133	Frauds upon the Government	$1,000 fine, and one year also 6 months extra in default of paying fine. Disabled from contracting with or holding office under Government	do
4	135	Breach of trust by public officer	Five years	do

(1) The offences under Title III are all indictable.

INDICTABLE OFFENCES (*Continued*).

No.	Art.	Offence.	Punishment.	Tribunal.
5	136	Corrupt practices in municipal affairs.	$1,000 fine and 2 years, also 6 months extra, in default of paying fine.	Sup. Court Cr. Juris.
6	137	Selling offices, &c.	Five years. (See Article 951) Disability from holding offices.	do
7	138	Disobedience to a statute.	One year	Gen'l or Qu'ter Sess.
8	139	Disobedience to orders of Court.	One year	do
9	140	Neglect of peace officer to suppress riot	Two years.	do
10	141	Neglect to aid peace officer in suppressing riot.	One year	do
11	142	Neglect to aid peace officer arresting offender.	Six months.	do
12	143	Misconduct of officers entrusted with warrants, etc.	Fine and imprisonment. (See Articles 934 & 951).	do
13	144	Obstructing public officer.	Ten years.	do
14	"	Obstructing peace officer. (1).	Two years.	do
15	146 & 148	Perjury.	Fourteen years and life.	do
16	146	Subornation of perjury.	Fourteen years.	do
17	147	False oaths.	Seven years.	do
18	150	False statements	Two years.	do
19	151	Fabricating evidence	Seven years	do
20	152	Conspiracy to bring false accusation.	Fourteen years and ten years.	do
21	153	Administering oaths without authority	$50 fine, or three months	do
22	154	Corrupting jurors or witnesses.	Two years.	do
23	155	Compounding penal actions	Fine, not exceeding penalty compounded for.	do
24	156	Corruptly taking reward for helping to recover stolen property.	Seven years.	do
25	157	Advertizing reward for stolen property	$250 penalty.	Civil Court.
26	158	Signing false certificate of executing death sentence.	Two years	Gen'l or Qu'ter Sess.
27	159	Being at large while under sentence	Two years.	Sup. Court Cr. Juris.
28	160	Assisting escape of prisoners of war.	Five years	do
29	161	Prison-breach	Seven years.	do
30	162	Attempted prison-breach.	Two years.	do
31	163 164	Escapes from lawful custody.	Two years	do
32 & 33	165 & 166	Rescuing prisoners or assisting escape	Seven years and 5 years.	do
34	167	Conveying anything into prison to aid escape	Two years	do
35	168	Unlawfully procuring prisoner's discharge.	Two years	do

Note. It will be understood that, with regard to the offences mentioned in the above Table as triable in a Superior Court of Criminal Jurisdiction, those offences cannot be tried in a Court of General or Quarter Sessions; and that with regard to the offences mentioned therein as triable in a Court of General or Quarter Sessions the latter Court has not exclusive jurisdiction over these offences, but in relation to them, its jurisdiction is concurrent with that of the Superior Courts of Criminal Juaisdsction. (2)

Art. 958, *post*, empowers Court to order in addition to sentence that defendant give security for future good behaviour, and on conviction for offences punishable with five years or less to inflict a fine in addition to or in lieu of any other punishment.

(1) This offence besides being indictable may also be tried summarily before two justices and in that case the punishment upon conviction is 6 months with hard labor or $100 fine.
(2) See Article 540, *post*.

LIMITATIONS OF TIME FOR PROSECUTIONS OF OFFENCES UNDER TITLE III.

Art.	133. Frauds upon the Government :	Two years.	(See Art. 551*b*).
"	136. Corruption in Municipal affairs :	Two years.	(See Art. 551*b*).
"	157*d*. Newspaper proprietor publishing advertizement offering reward for stolen property :	Six months.	(See Art. 551*d*).

Note. Art. 930, *post*, prescribes by two years actions suits or informations (not otherwise expressly limited) when they are for recovery of penalties, &c., referred to in Art. 929.

TITLE IV.

OFFENCES AGAINST RELIGION, MORALS AND PUBLIC CONVENIENCE.

PART XII.

OFFENCES AGAINST RELIGION.

170. Blasphemous libels.—Every one is guilty of an indictable offence and liable to one year's imprisonment who publishes any blasphemous libel.

2. Whether any particular published matter is a blasphemous libel or not is a question of fact. But no one is guilty of a blasphemous libel for expressing in good faith and in decent language, or attempting to establish by arguments used in good faith and conveyed in decent language, any opinion whatever upon any religious subject.

A blasphemous libel is said to consist in the publication of any profane words vilifying or ridiculing God, Jesus Christ, the Holy Ghost, the Old or New Testament or Christianity in general with intent to shock and insult believers, or to pervert or mislead the ignorant and unwary; and if a publication be "full of scurrilous and opprobrious language,—if sacred subjects are treated "with levity, if indiscriminate abuse is employed instead of argument,—then a "design to wound the religious feelings of others may be readily inferred. But "where the work is free from all offensive levity, abuse and sophistry, and is, in "fact the honest and temperate expression of religious opinions conscientiously "held and avowed, it is not a blasphemous libel." (1)

In one case Mr. Justice Erskine said: "It is indeed still blasphemy scoffingly "or irreverently to ridicule or impugn the doctrines of the Christian faith, yet "any man may without subjecting himself to any penal consequences, soberly "and reverently examine and question the truth of those doctrines which have been assumed as essential to it." (2)

The Royal Commissioners in their report say in regard to blasphemous libel that they deem it inexpedient to define it otherwise than by the use of that expression. They then go on to say, "As however we consider that the essence of the offence "(regarded as a subject for criminal punishment) lies in the outrage it inflicts "upon the religious feelings of the community, and not in the expression of "erroneous opinions, we have added a proviso to the effect that no one shall be "convicted of a blasphemous libel only for expressing in good faith and decent "language any opinion whatever upon any religious subject. We are informed "that the law was stated by Mr. Justice Coleridge to this effect in the case of "R. v. Pooley tried at Bodmin in 1857. We are not aware of any later authority "on the subject"

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(1) Odgers Libel and Sl. 440, 441.
(2) Shore v. Wilson, 9 Clark and Fin., 524-5.

The law as laid down by Mr. Justice Coleridge in R. v. Pooley (1) and as since stated by Lord Chief Justice Coleridge in the recent case of R. v. Ramsay and Foote is in effect that the publication of any matter, which has reference to God, Jesus Christ, the Bible or the Book of Common Prayer intended and calculated to wound the feelings of mankind or to excite contempt and hatred against the church or religion or to promote immorality is blasphemous; but that matters couched in decent and proper language and published and intended in good faith to advance religions opinions, which the publisher regards as true, are not blasphemous merely because their publication is likely to wound the feelings of those who have contrary opinions or because their general adoption might tend by lawful means to alterations in religion or in the constitution of the church. (2) Lord Chief Justice Coleridge in the course of his charge in the case of R. v. Ramsay and Foote, said, "*If the decencies of controversy are observed,* even the "fundamentals of religion may be attacked, without a person being guilty of "blasphemous libel."

By article 634 *post,* every one accused of publishing a *defamatory* libel may plead the truth of the matter published and that its publication was for the public benefit. But this does not apply to a blasphemous libel, the truth of which cannot be pleaded as a defence. (3)

171. Obstructing officiating clergyman.—Every one is guilty of an indictable offence and liable to two years' imprisonment who—

(*a.*) by threats or force, unlawfully obstructs or prevents, or endeavours to obstruct or prevent, any clergyman or other minister in or from celebrating divine service, or otherwise officiating in any church, chapel, meeting-house, school-house or other place for divine worship, or in or from the performance of his duty in the lawful burial of the dead in any church-yard or other burial place. R.S.C., c. 156, s. 1.

172. Violence to officiating clergyman.—Every one is guilty of an indictable offence and liable to two years' imprisonment who strikes or offers any violence to, or, upon any civil process or under the pretence of executing any civil process, arrests any clergyman or other minister who is engaged in or, to the knowledge of the offender, is about to engage in, any of the rites or duties in the next preceding section mentioned, or who, to the knowledge of the offender is going to perform the same, or returning from the performance thereof. R.S.C., c. 156, s. 1.

173. Disturbing religious meetings.—Every one is guilty of an indictable offence and liable, on summary conviction, to a penalty not exceeding fifty dollars and costs, and in default of payment to one month's imprisonment, who wilfully disturbs, interrupts or disquiets any assemblage of persons met for religious worship, or for any moral, social or benevolent purpose, by profane discourse, by rude or indecent behaviour, or by making a noise, either within the place of such meeting or so near it as to disturb the order or solemnity of the meeting. R. S. C., c. 156, s. 2.

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(1) Steph. Dig. Cr. Law, 97; Odgers Libel and Sl. 446, 459.

(2) R. v. Ramsay and Foote 48 L. T. 739; 15 Cox C. C. 231; Odgers Lib. and Sl. 688, 704; Steph. Dig. Cr. L. Art. 161.

(3) Cooke v. Hughes R. and M. 115; R. v. Hicklin L. R., 3 Q. B. 374; 37 L. J. M. C. 89; 11 Cox C. C. 19; 18 L. T. 395; Odgers Lib. and Sl. 440, 445.

PART XIII.

OFFENCES AGAINST MORALTY.

174. Sodomy.—Every one is guilty of an indictable offence and liable to imprisonment for life who commits buggery, either with a human being or with any other living creature. R.S.C., c. 157, s. 1.

175. Every one is guilty of an indictable offence and liable to ten years' imprisonment who attempts to commit the offence mentioned in the next preceding section. R.S.C., c. 157, s. 1.

See article 261 *post*, which provides that the consent of children under fourteen years is no defence to a charge of indecent assault.

176. Incest.—Every parent and child, every brother and sister, and every grandparent and grandchild, who cohabit or have sexual intercourse with each other, shall each of them, *if aware of their consanguinity*, be deemed to have committed incest, and be guilty of an indictable offence and liable to fourteen years' imprisonment, and the male person shall also be liable to be whipped : Provided that, if the court or judge is of opinion that the female accused is a party to such intercourse only by reason of the restraint, fear or duress of the other party, the court or judge shall not be bound to impose any punishment on such person under this section. 53, V., c. 37, s. 8.

Incest, adultery and fornication are not common law offences; but in England they are criminally cognizable under the ecclasiastical law, although, as Sir James F. Stephen points out, the only one which is prosecuted in these days is incest, an instance of which he mentions as having been prosecuted in recent times in the Bishop of Chichester Court. (1)

There being no competent Ecclesiastical Court in Canada, and the ecclesiastical law of England not being in force here, (2) none of these offences have heretofore been punishable in any part of Canada, except the provinces of Nova Scotia, New Brunswick and Prince Edward Island, under special local enactments passed by the legislatures of those provinces for the punishment of incest, (3) and also, as regards New Brunswick, for the punishment of adultery. (4)

See article 188, *post*, as to conspicacy to induce a woman te commit adultery or fornication.

The word "brother" used in the statutes of Vermont, punishing incest, has been held to include a brother of the half-blood. (5)

It has been held that it is not necessary to prove more than a single sexual act (6). But although proof of one commission of the offence is sufficient for

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(1) 2 Steph. His. Cr. L. 396.

(2) *In re* Lord Bishop of Natal, 3 Moo. C. C. N. S. 115; Burbridge Dig. Cr. L. 162.

(3) R. S. N. S. (3rd S.), c. 160, s. 2; R. S. N. B c. 145, s. 2; 24 Vic. (P. E. I.), c. 27, s. 3.

(4) R. S. N. B. c. 145, s. 3; Burbridge, 162.

(5) State v. Wyman, (Vermont Supreme Ct.), 8 Atl. Rep. 900; 9 Cr. L. Mag. 574.

(6) State v. Brown, 23 N. E. Rep. (Ohio), 747.

conviction proof is admissible of the various times and circumstances of the repetition of the offence. (1)

Either party to the offence, or both of them may be indicted. In a Nebraska case a party was indicted alone for the crime of incest, under the provisions of section 203 of the Criminal Code of that State. *Held* that he was properly indicted, and that it was not necessary that the indictment should be against both parties to the incestuous intercourse. (2)

The relationship must not only exist but the accused parties must have been aware of it; and therefore ignorance on the part of either party of the consanguinity, would relieve such party from culpability.

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. 53 V., c. 37, s. 6.

Sec. 6, of 53 Vic., c. 37, (which remains unrepealed), expressly mentions *indecent exposure of the person* as a punishable offence. It reads as follows:

"Every one who wilfully commits any indecent exposure of the person or act of gross indecency in any public place, in the presence of *one* or more persons, is guilty of a misdemeanor, and liable, on summary conviction before two justices of the peace, to a fine of fifty dollars or to six months' imprisonment with or without hard labor, or to both fine and imprisonment."

It has been held in England that the offence of indecent exposure of the person may be indictable if committed before several persons, even if the place be not public (3), and that men who bathe,—without any screen or covering,—so near to a public footpath that exposure of their persons must necessarily occur, are guilty of an indictable nuisance (4). Nor is it any defence that there has been so long as living memory extends, an usage so to bathe at the place, and that there has been no exposure beyond what is necessarily incidental to such bathing. (5)

There are some American cases indicating that neither the place need be public nor the exposure made to more persons than one. Thus in Vermont, where the law makes it punishable, for any man or woman married or unmarried to be guilty of open and gross lewdness, it was held that an indecent exposure by a man of his person to a woman whom he persisted in soliciting to acts of sexual intercourse, in spite of her denial and remonstrances, came within the inhibition (6). In a case in New-York six women in a room in a bawdy-house exposed their persons for hire to five men, the doors, windows and shutters being closed, and it was held that thereby they committed this offence; the place being deemed public. (7)

The act of indecency must be *wilful*; and therefore one, in a place however public, having by careful looking satisfied himself that no person was in a

(1) People v. Cease, 45 N. W. Rep. (Mich.) 585; Mathis v. Commonwealth, (Ky.), 13 S. W. Rep. 360; 12 Cr. L. Mag. 883.

(2) Yeeman v. State, (Nebraska Supreme Ct.), 31 N. W. Rep. 669; 9 Cr. L. Mag. 411.

(3) R. v. Wellard, 14 Q. B. D. 63; L. J. (M. C.) 14.

(4) R. v. Reid, 12 Cox, 1; *per Cockburn* C. J.; Arch. Cr. Pl. and Ev. 21 Ed. 1061.

(5) Id. *See also* R. v. Crunden, 2 Camp. 89.

(6) S. v. Millard, 18 Vt. 574, 46 Am. D. 170.

(7) P. v. Bixby, 4 Hun. 636; 1 Bish. New Cr. L. Com. s. 1129.

position to see him, might innocently do what would constitute an exposure if people were present. So that, if under these circumstances he happened, in fact to be seen, he would not be subject to punishment. (1)

178. Gross indecency.—Every male person is guilty of an indictable offence and liable to five years' imprisonment and to be whipped who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person, of any act of gross indecency with another male person. 53 V., c. 37, s. 5.

179. Publishing obscene matter.—Every one is guilty of an indictable offence and liable to two years' imprisonment who knowingly, without lawful justification or excuse—

(*a.*) publicly sells, or exposes for public sale or to public view, any obscene book, or other printed or 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 ;

(*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 abortion.

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.

3. It shall be a question of law whether the occasion of the 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 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 seller, publisher or exhibitor shall in all cases be irrelevant.

The corresponding section of the English Draft Code does not contain the words of the above sub-section (*c*), but has instead the clause "publishes any obscene libel," and it also omits the provision contained in paragraph 2 of the above article. The English section makes the punishment two years imprisonment *with hard labor*.

The Royal Commissioners in their report say that the section as to obscene publications expresses the existing law, but that it puts it in a much more definite form than before. They add, "We do not, however, think it desirable "to attempt any definition of obscene libel other than that conveyed by the "expression itself."

It will be seen by sub-section (*c*) of article 207 and article 208, *post*, that any one, *openly exposing or exhibiting in any street, road, highway or public place any indecent exhibition*, is liable to be summarily convicted as a vagrant.

180. Posting immoral books &c.—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—

(1) 1 Bish. New Cr. L. Com. s. 1133.

(*a.*) any obscene or immoral book, pamphlet, newspaper, picture, print, engraving, lithograph, photograph or other publication, matter or thing of an indecent or immoral 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 pretences. R.S.C., c. 35, s. 103.

181. Seduction.—Every one is guilty of an indictable offence and liable to two years' imprisonment who seduces *or* has illicit connection with any girl of previously chaste character, of or above the age of fourteen years and under the age of sixteen years. R.S.C., c. 157, s. 3 ; 53 V., c. 37, s. 3.

No prosecution for any offence under this article or under articles 182, 183, 185, 186, and 187, can be commenced after the expiration of one year from its commission. (1)

No conviction can be had under this or any of the remaining articles of this part upon the evidence of one witness, unless such witness is corroborated in some material particular implicating the accused. (2)

If the girl is under the age of fourteen the charge should be made under Article 269 *post*, for *carnally knowing* her.

As to proof of the child's age see R. v. Weaver, L. R 2 C. C. R. 85 ; 45 L. J. (M. C.) 13. Where the mother of the child stated its age, in the first instance, although on cross-examination she appeared neither to know the year nor the month of the child's birth, it was held that there was evidence to go to the jury of the child's age. (3)

With regard to the girl's previous chastity it has been held in some American cases that, although the law presumes that every woman is chaste and of good repute, it also presumes every one innocent of crime till proven guilty, and that in cases of seduction the burden is on the prosecution to prove in the first instance that the girl is of good repute. (4)

On an indictment for seducing a virtuous unmarried female, it was held in another American case that the want of moral chastity may be regarded on the question whether the girl though a virgin, was really seduced, or whether she shared the intercourse for the gratification of lascivious propensities not inflamed by the arts or importunity of the accused ; (5) and it has been held that an act of intercourse induced simply by mutual desire of the parties to gratify the sexual passion is not seduction. (6)

It will be observed, however that the above article (181) of our code has the words, " seduces *or* has illicit intercourse "; so that, while seduction, if proved, will be punishable it would seem also that the mere act of carnal connection with a previously chaste girl between the ages of fourteen and sixteen years would be sufficient, of itself, to constitute an offence under this article.

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(1) See Article 551 (*c*), *post*.
(2) See Article 684, *post*.
(3) R. v. Nicholls, 10 Cox, 476 ; Arch. Cr. Pl. & Ev. 21 Ed. 822.
(4) State v. McCaskey, (Mo.), 16 S. W. Rep. 511 ; 13 Cr. L. Mag. 819.
(5) O'Neill v. State, (Ga.), 11 S. E. Rep. 856.
(6) People v. De Fore, 31 N. W. Rep.

182. Seduction under promise of marriage.—Every one, above the age of twenty-one years, is guilty of an indictable offence and liable to two years' imprisonment who, *under promise of marriage*, seduces *and* has illicit connection with any unmarried female of previously chaste character and under twenty-one years of age. 50-51 V., c. 48, s. 2.

With regard to corroboration where the woman or girl is the only witness it has been held that evidence of such circumstances as usually accompany a marriage engagement is sufficient to satisfy the provision of the law of Missouri, which requires that the evidence of the woman in trials for seduction under promise of marriage must as to the promise of marriage be corroborated to the same extent as that of the principal witness to perjury; (1) and again, where the law makes it an offence to seduce an "innocent and virtuous" woman under promise of marriage, and provides, "that the unsupported testimony of the "woman shall not be sufficient to convict," the additional evidence required must not be confined to the act of sexual intercourse but must extend to its inducement by a promise of marriage. (2)

The Penal Code of Texas makes it a crime for any person "by promise to marry" to seduce an unmarried female, and declares that the term "seduction" is used in the sense in which it is commonly understood. The Court of Appeals of that State decided that to constitute seduction a man must, in addition to the promise of marriage, use some other means than a mere appeal to the lust or passion of the woman. White, P. J., in delivering the opinion of the Court made the following remarks on the subject :—

"'Seduction' implies that the female is led away from the path of rectitude and virtue and induced to indulge in carnal intercourse by the means used. Generally, in order to establish the charge of seduction, it must be made to appear that the intercourse was accomplished by some artifice or deception, and it is held that something more than a mere appeal to the lust or passion of the woman must be shown before the law will inflict the penalty prescribed for the crime. *State* v. *Fitzgerald*, 63 Iowa 268, 19 N. W. Rep. 202. Our statute expressly provides that the seduction must be accomplished by means of a 'promise to marry.' As was said in *People* v. *DeFore*, 64 Mich. 693, 31 N. W. Rep. 585: 'Under this statute the offence is committed if the man has carnal intercourse, to which the woman assented, if such assent was obtained by a promise of marriage, made by the man at the time, and to which, without such promise, she would not have yielded. *People* v. *Millspaugh*, 11 Mich. 278. The offence consists in enticing a woman from the path of virtue, and obtaining her consent to illicit intercourse by promises made at the time. The promise, and yielding her virtue in consequence thereof, is the gist of the offence. If she resists, but finally assents or yields, induced thereto or in reliance upon the promise made, the offence is committed.' *Boyce* v. *People*, 55 N. Y. 644. Mr. Bishop, in his work on Statutory Crimes (section 638, 2d ed.), says: 'Though the parties are already under marriage engagement, if the woman yields, not by reason of the man's promise of marriage, but simply for the gratification of a criminal desire, he does not commit the offence; yet the substance of the engagement does not render his act less a crime if she submits from reliance thereon.' In the words of Bleckley, J. (*Wilson* v. *State*, 58 Ga. 328): 'To make love to a woman, woo her, make honorable proposals of marriage, have them accepted, and afterwards undo her, under a solemn repetition of the engagement vow, is to employ persuasion as well as promises of marriage,' Under a statute quite similar to ours, where the language of the statute was.' 'If any person, under promise of marriage, seduce and debauch any unmarried female,' &c., the Supreme Court of Missouri, in an able opinion by Sherwood, J., says: 'There are two steps necessary to be taken in order to consummate the crime under discussion: *First*, the female must be seduced—that is, corrupted, deceived, drawn aside from the

(1) State v. Hill, 4 S. W. Rep. 121; 9 Cr. L. Mag. 594.
(2) State v. Ferguson (N. C.), 12 S. E. Rep. 574; 13 Cr. L. Mag. 486.

path of virtue which she was pursuing, her affections must be gained, her mind and thoughts polluted ; and, *second*, in order to complete the offence, she must be debauched—that is, she must be carnally known before the guilty agent becomes amenable to human laws. Thus it may be seen that a female may be seduced without being debauched, or debauched without being seduced. • • • A similar view of the proper construction of a statute substantially identical with our own was taken in Pennsylvania in *Commonwealth* v. *McCarty*, 2 Clark 135, and cited with approval in *State* v. *Patterson*, 88 Mo. 88.' *State* v. *Reeves*, 97 Mo. 668, 10 S. W. Rep. 841. In *State* v. *Patterson*, *supra*, we find a definition of the statutory word 'seduce,' which commends itself to our minds as eminently correct. It is as follows : The word "seduce," though a general term, and having a variety of meanings, according to the subject to which it is applied, has, when it is used with reference to the conduct of a man towards a woman, a precise and determinate signification, and is universally understood to mean an enticement of her on his part to surrender her chastity by means of some art, influence, promise or deception calculated to accomplish that object, and to include the yielding of her person to him as much as if it was expressly stated.' Citing *State* v. *Bierce*, 27 Conn. 319 ; *Dinkey* v. *Commonwealth*, 17 Pa. St. 127. As is pertinently said in *State* v. *Reeves*, *supra* ; 'No one can, with any degree of plausibility, contend that a virtuous female can be seduced without any of those arts, wiles and blandishments so necessary to win the hearts of the weaker sex. To say that such a one was seduced by simply a blunt offer of wedlock *in futuro*, in exchange for sexual favors *in præsenti*, is an announcement that smacks too much of bargain and barter, and not enough of betrayal. This is hire or salary, not seduction." (1)

See article 184 making the subsequent marriage of the parties a good defence.

183. Seduction of ward servant &c.—Every one is guilty of an indictable offence and liable to two years' imprisonment who, being a guardian, seduces *or* has illicit connection with his ward, and every one who seduces *or* has illicit connection with any woman or girl of previously chaste character and under the age of twenty-one years who is in his employment in a factory, mill or workshop, or who being in a common employment with him in such factory, mill or workshop, is, in respect of her employment or work in such factory, mill or workshop, under or in any way subject to his control or direction. 53 V., c. 37, s. 4.

184. Seduction of female passengers on vessels.—Every one is guilty of an indictable offence and liable to a fine of four hundred dollars, or to one year's imprisonment, who, being the master or other officer or a seaman or other person employed on board of any vessel, while such vessel is in any water within the jurisdiction of the Parliament of Canada, *under promise of marriage*, or *by threats*, or *by the exercise of his authority*, or *by solicitation*, or *the making of gifts or presents*, seduces *and* has illicit connection with any female passenger.

2. The subsequent intermarriage of the seducer and the seduced is, if pleaded, a good defence to any indictment for any offence against this or either of the two next preceding sections *except in the case of a guardian seducing his ward* R.S.C., c. 65, s. 37.

According to the terms of article 183, the mere fact of illicit connection by a guardian with his ward seems of itself,—independently of and in addition to

(1) 13 Cr. L. Mag. 603, 604.

seduction,—to constitute an offence under this article; and the same observation applies to that part of the article which refers to an employer of, or any foreman, or managing employee in common employment with, and having illicit connection with a woman or girl employed in a factory, mill, or workshop.

185. Procuring defilement of women.—Every one is guilty of an indictable offence, and liable to two years' imprisonment with hard labour, who—

(*a.*) procures, or attempts to procure, any girl or woman *under twenty-one years of age*, not being a common prostitute or of known immoral character, to have unlawful carnal connection, either within or without Canada, with any other person or persons; or

(*b.*) inveigles or entices *any such woman or girl* to a house of ill-fame or assignation for the purpose of illicit intercourse or prostitution, or knowingly conceals in such house any such woman or girl so inveigled or enticed; or

(*c.*) procures, or attempts to procure, *any* woman or girl to become, either within or without Canada, a common prostitute; or

(*d.*) procures, or attempts to procure, *any* woman or girl to leave Canada with intent that she may become an inmate of a brothel elsewhere; or

(*e.*) procures *any* woman or girl to come to Canada from abroad with intent that she may become an inmate of a brothel in Canada; or

(*f.*) procures, or attempts to procure, *any* woman or girl to leave her usual place of abode in Canada, such place not being a brothel, with intent that she may become an inmate of a brothel, within or without Canada; or

(*g.*) by threats or intimidation procures, or attempts to procure, *any* woman or girl to have any unlawful carnal connection, either within or without Canada; or

(*h.*) by false pretences or false representations procures *any* woman or girl, not being a common prostitute or of known immoral character, to have any unlawful carnal connection, either within or without Canada; or

(*i.*) applies, administers to, or causes to be taken by *any* woman or girl any drug, intoxicating liquor, matter, or thing with intent to stupify or overpower so as thereby to enable any person to have unlawful carnal connection with such woman or girl. 53 V., c. 39, s. 9; R.S.C., c. 157, s. 7.

There is an evident clerical error in the reference made at the end of this article. Instead of chapter 39 it should be chapter 37 of 53 Vict.

Search warrants.—Article 574, *post*, provides that,—"Whenever there is reason to believe that any woman or girl mentioned in section one hundred and eighty-five, Part XIII, has been inveigled or enticed to a house of ill-fame or assignation, then upon complaint thereof being made under oath by the parent, husband, master or guardian of such woman or girl, *or in the event of such woman or girl having no known parent, husband, master nor guardian* in the

place in which the offence is alleged to have been committed, *by any other person*, to any justice of the peace, or to a judge of any court authorized to issue warrants in cases of alleged offences against the criminal law, such justice of the peace or judge of the court may issue a *warrant to enter, by day or night*, such house of ill-fame or assignation, and if necessary use force for the purpose of effecting such entry whether by breaking open doors or otherwise, and *to search* for such woman or girl, and bring her, and the person or persons in whose keeping and possession she is, before such justice of the peace or judge of the court, who may, on examination, order her to be delivered to her parent, husband, master or guardian, or to be discharged, as law and justice require."

186. Parent or guardian procuring defilement.—Every one who, being the parent or guardian of any girl or woman,—

(*a.*) procures such girl or woman to have carnal connection with any man other than the procurer ; or

(*b.*) orders, is party to, permits or knowingly receives the avails of the defilement, seduction or prostitution of such girl or woman.

is guilty of an indictable offence, and liable to fourteen years' imprisonment if such girl or woman is under the age of fourteen years, and if such girl or woman is of or above the age of fourteen years to five years' imprisonment. 53 V., c. 37, s. 9.

187. Householders permitting defilement of girls on their premises.—Every one who, being the owner and occupier of any premises, or having, or acting or assisting in, the management or control thereof, induces or knowingly suffers any girl of such age as in this section mentioned to resort to or be in or upon such premises for the purpose of being unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man, or generally, is guilty of an indictable offence and—

(*a.*) is liable to ten years' imprisonment if such girl is under the age of fourteen years ; and

(*b.*) is liable to two years' imprisonment if such girl is of or above the age of fourteen and under the age of sixteen years. R.S.C., c. 157, s. 5 ; 53 V., c. 37, s. 3.

188. Conspiracy to defile.—Every one is guilty of an indictable offence and liable to two years' imprisonment who conspires with any other person by false pretenses, or false representations or other fraudulent means, to induce any woman to commit adultery or fornication.

See comments,—under article 176,—on incest, adultery and fornication, *ante*.
In a recent American case, (1) it was held that a count charging a conspiracy to induce a female to commit fornication may be joined in the same indictment with counts charging defendants with abduction of the same female for the purpose of prostitution, and with unlawfully detaining her in a house of ill-fame, though the first count charges a misdemeanor, and the others a felony ; and that upon trial on such an indictment, a verdict finding the defendants "guilty as charged in the indictment," and fixing a punishment that might be inflicted under any one of the counts, is sufficient.

(1) Herman et al. v. People, S. C., 22 N. E. Rep. 471 ; 12 Cr. L. Mag. 222 et seq

The remarks of *Baker*, J., in rendering the judgment of the Illinois Supreme Court (31st October 1889), upon an appeal taken after conviction were, in effect, as follows:

"Annie Herman, Charles Busse and William Sickman, plaintiffs in error, were indicted in the Criminal Court of Cook county, and, upon trial and conviction before the Court and a jury, were sentenced to the penitentiary—Herman and Busse for five years each, and Sickman for four years. * * * * * * * * The first, second and third counts are based upon section 46 of the Criminal Code, as amended by the act approved June 16th, 1887, and in force July 1st, 1887, Laws 1887, p. 167; Rev. Stat. Ill. (ed. 1889), ch. 38, § 46; The *first* count charges a *conspiracy* by false pretences, etc., to induce Catherine Sievers to have illicit criminal intercourse; the *second* charges a *conspiracy* to entice and take her away for the purpose of prostitution; and the *third* a *conspiracy* to entice and take her away for the purpose of concubinage. Under our statutes these three counts are for *misdemeanors*. * * * * * * * Two other counts are predicated upon section 1 of the Criminal Code (Rev. Stat., ch. 38, § 1). The one charges *an enticement and taking away for* the purpose of *prostitution*, and the other *an enticement and taking away for* the purpose of *concubinage*, Another count is based upon section 2 of "An act to prevent the prostitution of females;" * * * * * * * * and it charges that plaintiffs in error, *by force, false pretences and intimidation, detained and confined* said Catherine Sievers in a room against her will *for purposes of prostitution, etc.* * * * * Under our statutes these three last *counts* charge *felonies*. The verdict returned by the jury at the trial was as follows: 'We, the jury, find the said defendants guilty in manner and form as charged in the indictment, and fix the punishment of the defendants Annie Herman and Charles Busse at imprisonment in the penitentiary for the term of five years each, and fix the punishment of the defendant William Sickman at imprisonment in the penitentiary for the term of four years." Upon this verdict the plaintiffs in error were sentenced to the penitentiary for the terms allotted to them respectively. The evidence and the instructions of the court are not preserved by a bill of exceptions. Only two questions arise upon the record. One of these is, is there a misjoinder of counts? and the other, is the verdict sufficiently explicit to sustain the judgment of the court?

Plaintiffs in error contend that, as three of the counts are for felonies, and the other three for misdemeanors, they are improperly joined; and that their motions to quash the indictment, and to compel the people to make an election, should have prevailed; and that it was error to deny such motions. It was a principle of the English law, and the rule has been adopted in some of our states, that there can be no conviction for a misdemeanor upon an indictment for a felony, even where the allegations of the indictment include such misdemeanor, the reason being that persons charged with misdemeanors had at their trials advantages not allowed to those arraigned for felony. * * * * But such a practice does not obtain in this country: and it is the established doctrine in this state that a defendant, put on his trial for a crime which includes an offence of an inferior degree, may be acquitted of the higher offence and convicted of the lesser. *Carpenter* v. *People*, 4 Scam. (Ill.) 197; *Beckwith* v. *People*, 26 Ill. 500; * * * * * *Kennedy* v. *People*, 122 Id. 649, 13 N. E. Rep. 213. In 1 Bish. Crim. Pro. (2d ed.), ss 445, 446 it is stated in substance, that, * * * * in states where there can be a conviction for misdemeanor on an indictment for felony, counts for felony and misdemeanor may, under some circumstances, be properly joined, as where both counts relate to the same transaction * * * * * In the late case of *State* v. *Steward*, 9 Atl. Rep. 559 (decided by the Supreme Court of Vermont), it is said: 'Although authorities can be found that lay down the rule that felonies and misdemeanors or different felonies cannot be joined in the same indictment, still the rule in this and most of the states is otherwise. It is always and everywhere permissible for the pleader to set forth the offence he seeks to prosecute in all the various ways necessary to meet the possible phases of evidence that may appear at the trial. If the counts cover the same transaction, though involving offences of different grade, the court has it in its power to preserve all rights of defence intact.' See, also, *Stevick* v. *Commonwealth*, 78 Pa. St. 460; * * * *Hawker* v. *People*, 75 N. Y. 487; *Crowley* v. *Commonwealth*,

1 Metc. (Mass.) 575, and *State* v. *Lincoln*, 49 N. H. 464. It is urged that the Court has in *Lyons* v. *People*, 68 Ill. 275, and *Beasley* v. *People*, 89 Id. 571, decided that counts for felony and for misdemeanor cannot be joined. We do not so understand those cases. The question of joining counts for felony and for misdemeanor in the same indictment did not arise in either case. In the *Lyons Case* one count was for burglary and the other was for petit larceny, and under the law as it then stood petit larceny was a felony; and it was held that, as the two counts were based on a single transaction they were properly joined. In the *Beasley Case*, also, all the counts were for felonies, and the question here under consideration was not at issue, and what was there said cannot be regarded as a decision of such question The reasons upon which was based the English rule against joining felonies and misdemeanors in the same indictment have ceased to exist, and that rule, if now enforced, would be purely technical and arbitrary, and would subserve no useful or beneficial purpose, and its tendency would be to embarrass, delay and prevent the administration of justice. *Cessante ratione legis, cessat et ipsa lex.* Besides this, the rule is inconsistent with the practice which has long and uniformly prevailed in this state, of permitting, upon an indictment for felony, a conviction for a misdemeanor, which is included in the greater offence charged. It would be unreasonable to hold that upon an indictment for a felony a defendant may be convicted of a misdemeanor, there being no count specifically charging such misdemeanor, and yet hold that, if there is such specific count, there can be no such conviction. We think the better rule to be to permit the joinder of counts, whether for felony or for misdemeanor, where one and the same criminal transaction is involved in the different counts, or the felonies and the misdemeanors charged form distinct stages in the same offence. In the indictment before us, the several counts are merely statements in various forms of the proceedings in one and the same transaction, and are not inconsistent with each other, and may well have formed parts of the same offence. It is not impossible that plaintiffs in error should have formed a *conspiracy* to induce Catherine Sievers to have illicit criminal intercourse, and *conspiracies* to entice and take her away for the purposes both of prostitution and concubinage; that they should *actually have enticed and taken her away* for the purposes of *prostitution and concubinage*, and should have confined her in a house or room against her will for purposes of prostitution. If two or more offences form parts of one transaction, and are of such a nature that a defendant may be guilty of both or all, the prosecution will not, as a general rule, be put to an election. The right of demanding an election, and the limitation of the prosecution to one offence, is confined to charges which are actually distinct from each other, and do not form parts of one and the same transaction. *Goodhue* v. *People*, 94 Ill. 37; *Andrews* v. *People*, 117 Id. 195; 7 N. E. Rep. 265. In our opinion there is no misjoinder of counts in this case, and it was not error to overrule the motion to quash the indictment and the motion to compel the prosecution to make an election.

The other question is, whether the verdict is sufficient to sustain the judgment of the court. * * * * * The verdict found the defendants 'guilty in manner and form as charged in the indictment.' As we have seen, the six different counts are not inconsistent with each other, and it is possible the evidence may have been such as to establish guilt under each and all of them; and as the evidence is not in the record, it is to be presumed that such was the case. The punishments fixed by the verdict were five years in the penitentiary for two of the defendants and four years in the penitentiary for the other defendant. These penalties were legally applicable to each and every count, and were no greater than was authorized for either of the offences for which the defendants were tried. This not only tends further to show the defendants were found guilty upon all the counts, but also indicates they were not damnified by the form of the verdict. Besides this, not one of the counts in the indictment charges an offence which, under the statutes of the state, is deemed infamous. We are unable to take any view of the case that renders it probable, or even possible, that the rights of plaintiffs in error might have been injuriously affected by the fact that the jury in their verdict did not specify any particular count or counts, but returned a general verdict of guilty upon all the counts submitted to them.

We find no error in the record, and the judgment is affirmed."

189. Carnally knowing idiots &c.—Every one is guilty of an indictable offence and liable to four years' imprisonment who unlawfully and carnally knows, or attempts to have unlawful carnal knowledge of, any female idiot or imbecile, insane or deaf and dumb woman or girl, under circumstances which do not amount to rape but which prove that the offender knew, at the time of the offence, that the woman or girl was an idiot, or imbecile, or insane or deaf and dumb. R.S.C., c. 157, s. 3; 50-51 V., c. 48, s. 1.

190. Prostitution of Indian woman.—Every one is guilty of an indictable offence and liable to a penalty not exceeding one hundred dollars and not less than ten dollars, or six months' imprisonment—

(*a.*) who, being the keeper of any house, tent or wigwam, allows or suffers any unenfranchised Indian woman to be or remain in such house, tent or 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., c. 43, s. 106; 50-51 V., c. 33, s. 11.

PART XIV.

NUISANCES.

191. A common nuisance.—A common nuisance is an unlawful act or omission to discharge a legal duty, which act or omission *endangers* the lives, safety, health, property or comfort of the public, or by which the public are *obstructed* in the exercise or enjoyment of any right common to all Her Majesty's subjects.

This article is in the exact words of the corresponding section of the English Draft Code; and the following are the remarks thereon of the Royal Commissioners:

"With regard to nuisances, * * * we have,—in sections 151 and 152—(1), drawn a line between such nuisances as are and such as are not to be regarded as criminal offences. It seems to us anomalous and objectionable upon all

(1) Similar to our articles 192 and 193.

grounds that the law should in any way countenance the proposition that it is a criminal offence not to repair a highway when the liability to do so is disputed in perfect good faith. Nuisances which *endanger the life, safety or health* of the public stand on a different footing.

By the present law, when a civil right such as the right of way is claimed by one private person and denied by another, the mode to try the question is by an action. But when the right is claimed by the public, who are not competent to bring an action, the only mode of trying the question is by an indictment or information, which is in form the same as an indictment or information for a crime. But it was very early determined that though it was in form a prosecution for a crime, yet that as it involved a remedy for a civil right, the Crown's pardon could not be pleaded in bar. *See* 3 Inst. 237. And the legislature, so recently as in the statute 40 and 41 Vict. c. 14, again recognized the distinction. The existing remedy in such cases is not convenient, but it is not within our province to suggest any amendment. The other sections are mostly re-enactments of statutes; but sections 153 and 158 (1) are declaratory of the common law, though we have suggested the addition of hard labor to the punishment."

Public and private nuisances.—The term "nuisance" is derived from the French word *nuire*, to do hurt or to annoy.

A common or public nuisance, under the common law, is such as in its nature or its consequences is "an injury or damage to all persons who come within "the sphere of its operation, though it may be so in a greater degree to some "than to others" (2). According to Blackstone it is an offence "against the "public order and economical regimen of the State, being either the *doing* of a "thing to the annoyance of the king's subjects or the *neglecting to do* a thing "which the common good requires" (3). For example, if, in the operation of a manufactory,—such as a dye-works, a tallow furnace, a smelting house, a tanning factory, or a lime-pit for cleaning skins,—volumes of noxious smoke or poisonous effluvia are emitted; to persons who are within, the reach of these operations and whose health may be thereby endangered, a nuisance, in the popular sense of the term, is committed. So, also, an obstruction in a highway is, to all who have occasion to travel upon it, a nuisance. It may be a greater nuisance to those who have to travel over it daily than it is to a person using it only once a year; but it is more or less a nuisance to every one who has occasion to use it, and it is therefore a *common or public nuisance*, (4) although not of so serious a character as a nuisance endangering life or health.

Where, however, the thing complained of is such as to be limited to one or only a few individuals, it is a private nuisance. For instance, if a man by building up a wall darkens the ancient windows of one or of several different dwelling houses, this is only an injury or a nuisance to the particular persons who live in them. It does not affect the public generally and he is not, in thus acting, necessarily guilty of a common nuisance (5).

Of course it is needless to remark that a private nuisance cannot be the subject of a criminal prosecution. A nuisance is not a criminal offence unless it is a common nuisance; and, as will be seen by articles 192 and 193 even a common nuisance is not always and under all circumstances a criminal offence. Article 191 defines what common nuisances are; and article 192 specifies which of them are indictable as criminal offences, by enacting that a common nuisance, is so indictable which endangers the lives safety or health of the public or which, (though not dangerous to life &c.), occasions injury to the person of any individual. (6)

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(1) Sections 153 and 158 are similar to our articles 194 and 206, *post*.

(2) Soltau v. DeHeld, 2 Sim. N. S. 142

(3) 4 Bl. Com. 166.

(4) See Att. Gen. v. Sheffield Gas Consumer's Co., 3 De G., M. and G. 304; Imperial Gas Light & Coke Co. v. Broadbent, 7 H. L. Ca. 600; Crowder v. Tinkler, 19 Ves. 617; Reg v. Train, 2 B. and S. 640; Jones v. Powell, Palm. 539; Bliss v. Hall, 4 Bing. N. C. 183; Broom's Com. L. 706, 894.

(5) Soltau v. DeHeld, 2 Sim. N. S. 143.

(6) See further comments under article 192 *post*.

It has been said that in judging of a public nuisance, the public good it does might, in some cases, where the public health was not concerned, be taken in consideration, in order to see if the public annoyance was outweighed by the public benefit derived ; (1) but this doctrine was overruled in Ward's case, where it was held to be no answer to an indictment for a nuisance in a harbor, by erecting an embankment. that although the work was in some degree a hindrance to navigation it was advantageous in a greater degree to the other uses of the port. (2)

No length of time will legalize a nuisance. (3)

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

Under the general definition contained in article 191 there must,—in order to constitute a common nuisance,—be either an unlawful act *done* or a legal duty *omitted*, which unlawful act or unlawful omission *endangers* public, life, safety, health, property, or comfort, or obstructs the public in the exercise or enjoyment of a common right.

When we take Articles 191, 192, and 193, and read them together, we find that common nuisances, as therein dealt with, divide themselves into two classes, namely, 1, those which are dangerous to the lives, safety or health of the public, and, 2, those which are not dangerous to the lives, safety, or health of the public,—although they may interfere with or even endanger public comfort or property, or obstruct the public in exercising or enjoying a common right.

With regard to the first of these two classes,—a common nuisance of a nature to endanger the lives, safety or health of the public,—it is criminal in itself, and is so treated in article 192, which makes it an indictable offence ; but with regard to the second class,—those which are not of a nature to endanger the lives, etc., of the public,—it seems that none of them is to be treated as a criminal offence, except when occasioning actual injury to the person of some individual ; and, then being,—(under the general definition in article 191),—a common nuisance, (though not criminal. in itself, because not in its nature dangerous to public life, safety, or health), it becomes an indictable offence by the terms of article 192, which makes *every* common nuisance, (not, in itself. dangerous to public life, safety or health), a criminal offence if it occasions injury to the person of any individual. In other words, all common nuisances, which are in themselves dangerous to public life, safety or health, are indictable offences, and all other common nuisances become indictable and punishable when they occasion actual injury to the person of any individual.

Article 192 must not be taken to mean that an *act* which occasions injury to the person of any individual is thereby constituted a common nuisance. As any one, who makes but a cursory examination of it, will readily see, the article does not say so. On the contrary it deals, disjunctively, but distinctly, with two different classes of common nuisance; and if we were to take out from the article the words,—" which *endangers* the lives safety or health of the public, " or,"—the article would still be complete and would read as follows:

" Every one is guilty of an indictable offence, and liable to one years imprison-
" ment or a fine, who commits *any common nuisance* which *occasions injury* to
" the person of any individual."

If, on the other hand, we were totake out from the article the words " or which

(1) R. v. Russell, 6 B. & C. 566.
(2) R. v. Morris, 1 B. & Ad. 441 ; R, v. Randall, C. & Mar. 496.
(3) R. v. Cross, 3 Camp. 227 ; S. v. Rankin, 3 S. C. 438, 16 Am. R. 737 ; 1 Bish New Cr. L. Com. s. 1078*a*.

"*occasions injury* to the person of any individual," the article would, in that case also, be complete and would read as follows:

"Every one is guilty of an indictable offence, and liable to one year imprison-
"ment or a fine, who commits *any common nuisance* which *endangers* the lives,
"safety or health of the public."

There are thus two separate and distinct offences dealt with by this article 192. In each there is a common nuisance, and each must conform to and fulfil the essential elements of a common nuisance as defined, in a general way, by article 191; but one is and must be a common nuisance which in its nature endangers public life, safety or health; while the other is and must be a common nuisance which, (not being in itself dangerous to public life, safety or health), has occasioned injury to some individual.

193. Common nuisances which are not criminal.—Any one convicted upon any indictment or information for any common nuisance other than those mentioned in the preceding section, shall not be deemed to have committed a criminal offence; but all such proceedings or judgments may be taken and had as heretofore to abate or remedy the mischief done by such nuisance to the public right.

See comments under article 191 and 192.

194. Selling articles unfit for human food.—Every one is guilty of an indictable offence and liable to one year's imprisonment who knowingly and wilfully exposes for sale, or has in his possession with intent to sell, for human food articles which he knows to be unfit for human food.

2. Every one who is convicted of this offence after a previous conviction for the same crime shall be liable to two years' imprisonment.

See "The Adulteration Act" chapter 107 R.S.C., and its amendments 51 Vic., c. 24, and 53 Vic., c. 26.

DISORDERLY HOUSES DEFINED.

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

196. Common gaming-house.(1)—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

(*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

(1) See article 201 sub. sec. 3, *post*, which makes a Bucket shop a common gaming-house.

against whom the game is managed, or against whom the other players stakes, play or bet.

197. Common betting-house.—A common betting-house is a house, office, room or other place—

(*a.*) opened, kept or used for the purpose of betting between persons resorting thereto and—

(i.) the owner, occupier, or keeper thereof;

(ii.) any person using the same:

(iii.) any person procured or employed by, or acting for or on behalf of any such person;

(iv.) any person having the care or management, or in any manner conducting the business thereof; or

(*b.*) opened, kept or used for the purpose of any money or valuable thing being received by or on behalf of any such person as aforesaid, as or for the consideration

(i.) for any assurance or undertaking, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race or other race, fight, game or sport; or

(ii.) for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency.

198. Keeping a disorderly house.—Every one is guilty of an indictable offence and liable to one year's imprisonment who keeps any disorderly house, that is to say, any common bawdy-house, common gaming-house or common betting-house, as hereinbefore defined.

2. Any one who appears, acts, or behaves as master or mistress, or as the person having the care, government or management, of any disorderly house shall be deemed to be the keeper thereof, and shall be liable to be prosecuted and punished as such, although in fact he or she is not the real owner or keeper thereof.

Article 207 (*j*) *post*, renders a keeper of a disorderly house liable also as a vagrant to summary punishment.

Bawdy-house.—Another definition of a bawdy-house different in words though not in effect from that contained in Article 195 is "any place whether of "habitation or temporary sojourn, kept open to the public, either generally or "under restrictions, for licentious commerce between the sexes;" (1) and "a house of ill-fame kept for the resort and convenience of lewd people of both sexes" (2). Coke says, "Although adultery and fornication be punishable by the "ecclesiastical law, yet the keeping of a house of bawdry, or stews, or brothel-"house being as it were a common nuisance is punishable by the common law: "and is the cause of many mischiefs, not only to the overthrow of the bodies "and wasting of their livelihoods, but to the endangering of their souls. (3)

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(1) 1 Bish. New Cr. L. Com. 1083.
(2) Bouv. Law Dict., Bawdy-house: Harwood v. P. 26 N. Y. 190.
(3) 3 Inst. 205.

If a lodger let her apartment for the purpose of indiscriminate prostitution, it is as much a bawdy-house as if she held the whole house. (1)

It is not necessary that there should be evidence of any indecency or disorderly conduct perceptible from the outside of the house. (2)

The keeper of a bawdy-house may be a man or a woman; and a married woman may be indicted for the offence either alone or with her husband. (3)

The gist of the offence appears to consist in the allurement which the place holds out to a miscellaneous and common bawdry corrupting to public morals. By way of comparison and illustration it has been said that as an inn is for all travellers, so a bawdy-house is for all persons lewdly inclined. Generally, though not necessarily,—it supplies the girls, who may either dwell in the house, or visit it with or without the men accompanying, for the evil practice. (4)

Searching suspected gaming-houses &c.—Places suspected of being gaming-houses &c. may be searched under the provisions of Article 575, which is as follows:

"If the chief constable or deputy chief constable of any city or town, or other officer authorized to act in his absence, reports in writing to any of the commissioners of police or mayor of such city or town, or to the police magistrate of any town, that there are good grounds for believing, and that he does believe, that any house, room or place within the said city or town is kept or used as a common gaming or betting-house as defined in Part XIV., sections one hundred and ninety-six and one hundred and ninety-seven, or is used for the purpose of carrying on a lottery, or for the sale of lottery tickets, contrary to the provisions of Part XV., section two hundred and five, whether admission thereto is limited to those possessed of entrance keys or otherwise, the said commissioners or commissioner, or mayor, or the said police magistrate, 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 the chief constable, deputy chief constable or other officer,—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, and all moneys and securities for money, or, 2, all instruments or devices for the carrying on of such lottery, and all lottery tickets found in such house or premises.

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 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 any such instruments or devices or lottery tickets as aforesaid, which he so finds.

3. The police magistrate or other justice of the peace 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, used in playing any game, and seized under this Act in any place used as a common gaming-house, or any such instruments or devices for the carrying on of a lottery, or any such lottery tickets as aforesaid, to be forthwith destroyed, and any money or securities seized under this section shall be forfeited to the Crown for the public uses of Canada.

4. The expression 'chief constable' includes chief of police, city morshal or other head of the police force of any city, town or place.

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(1) R. v. Pierson, 2 Ld. Raym. 1197; 1 Salk. 382.

(2) R. v. Rice, L. R., 1 C. C. R. 21; 35 L. J. (M. C.) 93; Sylvester v. S. 42 Tex. 496.

(3) R. v. Williams, 10 Mod. 63; 1 Salk. 384; C. v. Cheney, 114 Mass. 281; 1 Bish. New Cr. L. Com. 1084.

(4) King v. P. 83 N. Y. 587.

5. The expression 'deputy chief constable' includes deputy chief of police, deputy or assistant city marshal or other deputy head of the police force of any city, town or place, and the expression 'police magistrate' includes stipendiary magistrates."

Sections 9 and 10 of the R. S. C., chap. 158, (which are unrepealed), empower a police magistrate to swear and examine, when brought before him, any persons found in any gaming house entered and searched under the provisions of article 57a. These sections are as follows :

" The police magistrate, mayor or justice of the peace, before whom any person is brought who has been found in any house, room or place, entered 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 delaiyng the entry into such house, room or place, or any part thereof, of any constable or officer authorized as aforesaid; and no person so required to be examined as a witness shall be excused from being so examined when brought before such police magistrate, mayor or justice of the peace, or from being so examined at any subsequent time by or before the police magistrate or mayor or any justice of the peace, or by or before any court, on any proceeding, or on the trial of any indictment, information, action or suit in anywise relating to such unlawful gaming or any such acts as aforesaid, or from answering any question put to him touching the matters aforesaid, on the ground that his evidence will tend to criminate himself; and any such person so required to be examined as a witness who refuses to make oath accordingly, or to answer any such question, shall be subject to be dealt with in all respects as any person appearing as a witness before any justice or court in obedience to a summons or subpœna and refusing without lawful cause or excuse to be sworn or to give evidence, may, by law, be dealt with; but nothing in this section shall render any offender, under the sixth section of this Act, liable on his trial to examination hereunder."

" 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 staved. 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."

Evidence of a place being a common gaming house.—On this point there are special provisions contained in articles 702 and 703, *post*, which are as follows:

" 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* evidenee, on the trial of a prosecution under section one hundred and ninety-eight, 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 chief constable, deputy chief constable or other officer entering the same under a

warrant or order issued under this Act, or in the presence of those persons by whom he is accompanied as aforesaid."

"It shall be *primâ facie* evidence in any prosecution for keeping a common gaming-house under section one hundred and ninety-eight of this Act 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."

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 them twenty dollars and in default of payment to two months' imprisonment. R.S.C., c. 158, s. 6.

200. Obstructing peace officer entering gaming-house.—Every one is guilty of an offence and liable, on summary conviction before two justices of the peace, to a penalty not exceeding one hundred dollars, and to six months' imprisonment with or without hard labour who—

(*a.*) wilfully prevents any constable or other officer duly authorised to enter any disorderly house, as mentioned in section one hundred and ninety-eight, from entering the same or any part thereof; or

(*b.*) obstructs or delays any such constable or officer in so entering; or

(*c.*) by any bolt, chain or other contrivance secures any external or internal door of, or means of access to, any common gaming-house so authorised to be entered; or

(*d.*) uses any means or contrivance whatsoever for the purpose of preventing, obstructing or delaying the entry of any constable or officer, authorised as aforesaid, into any such disorderly house or any part thereof. R.S.C., c. 158, s. 7.

201. Gaming in stocks, &c.—Every one is guilty of an indictable offence and liable to five years' imprisonment, and to a fine of five hundred dollars, who, with the intent to make gain or profit by the rise or fall in price of any stock of any incorporated or unincorporated company or undertaking, either in Canada or elsewhere or of any goods, wares or merchandise—

(*a.*) without the *bonâ fide* intention of acquiring any such shares, goods, wares or merchandise, or of selling the same, as the case may be, makes or signs, or authorises to be made or signed, any contract or agreement, oral or written, purporting to be for the sale or purchase of any such shares of stock, goods, wares or merchandise; or

(*b.*) makes or signs, or authorises to be made or signed, any contract or agreement, oral or written, purporting to be for the sale or purchase of any such shares of stock, goods, wares or merchandise in respect of which no delivery of the thing sold or purchased is made or received, and without the *bonâ fide* intention to make or receive such delivery.

2. But it is not an offence if the broker of the purchaser receives delivery, on his behalf, of the article sold, notwithstanding that such broker retains or pledges the same as security for the advance of the purchase money or any part thereof.

3. Every office or place of business (1) 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 V., c. 42, ss. 1 and 3.

The *onus* of proving a *bonâ fide* intention is thrown upon the accused. This is provided by article 704, *post*, which is as follows:

"Whenever, on the trial of a person charged with making an agreement for the sale or purchase or shares, goods, wares or merchandise in the manner set forth in section two hundred and one, it is established that the person so charged has made or signed any such contract or agreement of sale or purchase, or has acted, aided or abetted in the making or signing thereof, the burden of proof of the *bonâ fide* intention to acquire or to sell such goods, wares or 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. (2)—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 V., c. 42, s. 1.

203. Gambling in public conveyances.—Every one is guilty of an indictable offence and liable to one year's imprisonment who—

(*a.*) in any railway car or steamboat, used as a public conveyance for passengers, by means of any game of cards, dice or other instrument of gambling, or by any device of like character, obtains from any other person any money, chattel, valuable security or property; or

(*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

(1) These places are popularly called *Bucket-Shops*.

(2) See article 201, sub-sec. 3, (*ante*), under which every bucket-shop is a common gaming-house.

every clerk or employee when authorised by the conductor or superior officer in charge of, any railway train or steamboat, station or landing place in or at which any such offence, as aforesaid, is committed or attempted, must, with or without warrant, arrest any person whom he has good reason to believe to have committed or attempted to commit the same, and take him before a justice of the peace, and make complaint of such offence on oath, in writing.

3. Every conductor, master or superior officer in charge of any such railway car or steamboat, who makes default in the discharge of any such duty is liable, on summary conviction, to a penalty not exceeding one hundred dollars and not less than twenty dollars.

4. Every company or person who owns or works any such railway car or steamboat must keep a copy of this section posted up in some conspicuous part of such railway car or steamboat.

5. Every company or person who makes default in the discharge of such duty is liable to a penalty not exceeding one hundred dollars and not less than twenty dollars. R.S.C., c. 160, ss. 1, 3 and 6.

204. **Betting and pool-selling.**—Every one is guilty of an indictable offence, and liable to one year's imprisonment, and to a fine not exceeding one thousand dollars, who—

(*a.*) uses or knowingly allows any part of any premises under his control to be used for the purpose of recording or registering any bet or wager, or selling any pool ; or

(*b.*) keeps, exhibits, or employs, or knowingly allows to be kept, exhibited or employed, in any part of any premises under his control, any device or apparatus for the purpose of recording any bet or wager or selling any pool ; or

(*c.*) becomes the custodian or depositary of any money, property or valuable thing staked, wagered or pledged ; or

(*d*) records or registers any bet or wager, or sells any pool, upon the result—

(i.) of any political or municipal election ;

(ii.) of any race ;

(iii.) of any contest or trial of skill or endurance of man or beast.

2. The provi ions of this section shall not extend to any person by reason of his becoming the custodian or depositary of any money, property or valuable thing staked, to be paid to the winner of any lawful race, sport, game, or exercise, or to the owner of any horse engaged in any lawful race, or to bets between individuals or made on the race course of an incorporated association during the actual progress of a race meeting. R.S.C., c. 159, s. 9.

205. **Lotteries.**—Every one is guilty of an indictable offence and liable to two years' imprisonment and to a fine not exceeding two thousand dollars, who—

(*a.*) makes, prints, advertises or publishes, or causes or procures to be made, printed, advertised or published, any proposal, scheme or

plan for advancing, lending, giving, selling or in any way disposing of any *property*, by lots, cards, tickets, or any mode of chance whatsoever; or

(*b.*) sells, barters, exchanges or otherwise disposes of, or causes or procures, or aids or assists in, the sale, barter, exchange or other disposal of, or offers for sale, barter or exchange any lot, card, ticket or other means or device for advancing, lending, giving, selling or otherwise disposing of any *property*, by lots, tickets or any mode of chance whatsoever.

2. Every one is guilty of an offence and liable on summary conviction to a penalty of twenty dollars, who buys, takes or receives any such lot, ticket or other device as aforesaid.

3. Every sale, loan, gift, barter or exchange of any property, by any lottery, ticket, card or other mode of chance depending upon or to be determined by chance or lot, is void, and all such property so sold, lent, given, bartered or exchanged, is liable to be forfeited to any person who sues for the same by action or information in any court of competent jurisdiction.

4. No such forfeiture shall affect any right or title to such property acquired by any *bonâ fide* purchaser for valuable consideration, without notice.

5. 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.

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 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 bazar is held and the articles raffled for thereat have first been offered for sale and none of them are of a value exceeding fifty dollars; or

(*c.*) any distribution by lot among the members or ticket holders of any incorporated society established for the encouragement of art, of any paintings, drawings or other work of ar produced by the labour of the members of, or published by or under the direction of, such incorporated society;

(*d.*) the Crédit Foncier du Bas-Canada, or to the Crédit Foncier Franco-Canadien.

See article 575 (set out under article 198, *ante* p.) containing special provisions for searching gaming houses and lottery houses.

Under article 3 (*v*), *ante* p. 5, the expression *property* includes:

"(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."

206. Misconduct in respect to human remains.—Every one is guilty of an indictable offence and liable to five years' imprisonment who—

(*a.*) without lawful excuse, neglects to perform any duty either imposed upon him by law or undertaken by him with reference to the burial of any dead human body or human remains; or

(*b.*) improperly or indecently interferes with or offers any indignity to any dead human body or human remains, whether buried or not.

It is an offence at common law to dig up a dead body from a grave; and it is no defence to such a charge that the motives of the defendant were laudable. (1) And a person who without lawful authority disposes of a dead body for dissecting purposes and for gain and profit is indictable at common law. (2)

PART XV.

VAGRANCY.

207. Every one is a loose, idle or disorderly person or vagrant who—

(*a.*) not having any visible means of maintaining himself lives without employment;

(*b.*) being able to work and thereby or by other means to maintain himself and family wilfully refuses or neglects to do so;

(*c.*) openly exposes or exhibits in any streets, 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,

(1) R. v. Sharp, Dears. & B. 160, 26 L. J. (M. C.) 47; see also R. v. Giles, R. & R. 366*n*.

(2) R. v. Feist, Dears. & B. 590; Arch. Cr. Pl. & Ev. 21 Ed. 1071, 1072.

residing in the municipality where the alms are being asked, that he or she is a deserving object of charity, wanders about and begs, or goes about from door to door, or places himself or herself in any street, highway, passage or public place to beg or receive alms ;

(*e.*) loiters on any street, road, highway or public place, and obstructs passengers by standing across the footpath, or by using insulting language, or in any other way ;

(*f.*) causes a disturbance in or near any street, road, highway or public place, by screaming, swearing, or singing or by being drunk, or by impeding or incommoding peaceable passengers ;

(*g.*) by discharging fire arms, or by riotous or disorderly conduct in any street or highway, wantonly disturbs the peace and quiet of the inmates of any dwelling-house near such street or highway;

(*h.*) tears down or defaces signs, breaks windows, or doors or door plates, or the walls of houses, roads or gardens, or destroys fences;

(*i.*) being a common prostitute or night walker, wanders in the fields, public streets or highways, lanes or places of public meeting or gathering of people, and does not give a satisfactory account of herself ;

(*j.*) is a keeper or inmate of a disorderly house, bawdy-house or house of ill-fame, or house for the resort of prostitutes ; (1)

(*k.*) is in the habit of frequenting such houses and does not give a satisfactory account of himself or herself ; or

(*l.*) having no peaceable profession or calling to maintain himself by, for the most part supports himself by gaming or crime, or by the avails of prostitution. R.S.C., c. 157, s. 8.

208. Every loose, idle or disorderly person or vagrant is liable, on summary conviction before two justices of the peace, 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.

Under the common law of England a vagrant, as such, was not indictable, but an idle and loose person could be apprehended and bound to his good behaviour ; (2) and there are many early statutes authorizing summary proceedings against idlers, vagabonds and rogues, and against wandering mariners and soldiers, and against gypsies. (3)

In a case where, under the Canadian Vagrancy Act, 32 and 33 Vic., c. 28, a woman was convicted of being a common prostitute and of wandering in the public streets and not giving a satisfactory account of herself, the conviction was held illegal, because it did not allege that the woman was asked, before being taken, or when she was being taken, to give an account of herself ; and it was held further that an allegation "she giving no satisfactory account" does not shew that any prior demand was made upon her to give an account of herself. (4)

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(1) *See* article 198, *ante*, as to *bawdy-houses*.
(2) Rex v. King's Langley, 1 Stra. 631; Reg. v. Egan, 1 Crawf. & Dix. C.C. 338 ; Rex v. Talbot, 11 Mod. 415 ; 4 Bl. Com. 169.
(3) 4 Bl. Com. 165.
(4) Reg. v. Levecque, 30 U. C. Q. B. 509.

When a person is charged with vagrancy in being able to work and maintain himself and family and wilfully refusing or neglecting to do so, an obligation to maintain must be established against him. For instance, a man is not bound to support his wife who has left him and is living in adultery; (1) nor can a person, charged as above, be convicted if he offers to take back his wife. (2)

Where a woman who, being deserted by her husband, and having no means of maintaining her children, left them so that they became chargeable to the parish, it was held that she could not be convicted, under the English Vagrant Act, 5 Geo. IV, c. 83, s. 4. (3)

Being drunk is not an offence under clause (*f*) of the above Article. The offence consists in causing a disturbance by being drunk. (4)

A licensed carter who, contrary to a city ordinance, loiters on the street near the entrance of a hotel and solicits passengers to hire his cab, but who does not obstruct passengers, is not within clause (*e*) of the above article. (5)

Search warrants.—Article 576, *post*, provides that,—"Any stipendiary or police magistrate, mayor or warden, or any two justices of the peace, upon information before them made, that any person described in Part XV as a loose, idle or disorderly person, or vagrant, is or is reasonably suspected to be harboured or concealed in any disorderly house, bawdy-house, house of ill-fame, tavern or boarding-house, may, by warrant, authorize any constable or other person to enter at any time such house or tavern, and to apprehend and bring before them or any other justices of the peace, every person found therein so suspected as aforesaid."

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(1) Reg. v. Flinton, 1 B. & Ad. 227.
(2) Flannagan v. Bishop Wearmouth, 8 R. & B. 451.
(3) Peters v. Cowie, L. R. 2 Q. B. D. 131; Clarks Cr. L. 2d. Ed. 340.
(4) *Ex-parte* Despatie, 9 L. N. 387; R. v. Daly, 24 C. L. J. 157.
(5) Smith v. R, 4 M. L. R. 325; Burbridge Dig. Cr. Law, 188.

FORMS OF INDICTMENT UNDER TITLE IV.

HEADING OF INDICTMENT.

In the (*name of Court in which the indictment is found*).

The Jurors for our Lady the Queen present that (*Where there are more counts than one add at the beginning of each count*) ;

The Jurors aforesaid further present that

STATEMENTS OF OFFENCES.

BLASPHEMOUS LIBEL.

On at A. unlawfully did publish a certain blasphemous indecent and profane libel of and concerning the Holy Scriptures and the Christian religion, in one part of which said libel there were and are contained amongst other things certain blasphemous, indecent and profane matters and things, of and concerning the Holy Scriptures and the Christian religion, of the tenor following, that is to say, [*here set out the libellous passage, and if there be another such passage in another part of the publication introduce it thus* : "and in another part whereof there were and are contained, amongst other things, certain other blasphemous, indecent and profane matters and things, of and concerning the Holy Scriptures and of the Christian religion, of the tenor following that is to say," *etc. etc., and conclude the count thus*] : to the high displeasure of Almighty God, and to the great scandal and reproach of the Christian religion.

OBSTRUCTING OFFICIATING CLERGYMAN.

A, on at unlawfuily did by force (*threats or force*) obstruct and prevent B, a clergyman from celebrating divine service in the parish church of the parish of C. [*or* "in the performance of his duty in the lawful burial of the dead in the church yard of the parish church of the parish of C, "].

STRIKING OR ARRESTING OFFICIATING CLERGYMAN.

A, on at unlawfully did arrest B, a clergyman upon a certain civil process [*or* "did strike" *or* "did offer violence to B, a clergyman "] whilst he the said B, as such clergyman, was going to

perform divine service, he the said A, then well knowing that the said B, was a clergyman, and was so going to perform divine service.

SODOMY.

A, on at unlawfully did assault, and then and there, unlawfully wickedly, and against the order of nature have a venereal affair with and carnally know B, and then and there unlawfully wickedly and against the order of nature with the said B, did commit and perpetrate that detestable and abominable crime of buggery.

BESTIALITY.

A, on at , with a certain mare, ("*any other living creature*"), unlawfully, wickedly, and against the order of nature, did have a venereal affair, and, then and there, unlawfully, wickedly, and against the order of nature, with the said mare, did commit and perpetrate that detestable and abominable crime of buggery.

ATTEMPT TO COMMIT SODOMY.

A, on at , unlawfully did assault B, and then and there unlawfully did attempt to wickedly, and against the order of nature, have a venereal affair with and to carnally know and commit and perpetrate with the said B that detestable and abominable crime of buggery.

INCEST.

A, on at , did unlawfully have sexual intercourse (*or* "did unlawfully cohabit") with his sister B, he the said A, then and there, knowing her the said B, to be his sister.

OR.

On at , A, and B, then and there being and knowing themselves to be brother and sister did unlawfully commit incest (*or* "did unlawfully have sexual intercourse") with each other.

ACT OF GROSS INDECENCY.

On at , A, a male person, in public (*or* "in private") did commit an act of gross indecency with B, another male person.

OR,

On at , A, a male person was a party to the commission of (*or* "did procure the commission of" *or* "did attempt to procure the commission of") an act of gross indecency, in public, (*or* "in private") by B, also a male person, with C, another male person.

SELLING OR PUBLICLY EXPOSING AN OBSCENE PICTURE.

A, on at , in a certain open and public store of him the said A, there situate, unlawfully, knowingly and without lawful justification or excuse did sell (*or* "expose for public sale" *or* "expose to public view") a certain lewd, wicked, indecent and obscene picture (*or* "photograph," *or* "model") representing a naked man and a naked woman in a lewd, indecent and obscene posture together (or, *as the case may be*), and having a tendency to corrupt morals.

SEDUCTION OF GIRL BETWEEN FOURTEEN AND SIXTEEN.

On at A, unlawfully did seduce [*or* "did have illicit connection with"] B, a girl, of previously chaste character, then being of (*or* "above") the age of fourteen years and under the age of sixteen years.

SEDUCTION UNDER PROMISE OF MARRIAGE.

On at A, being then above the age of twenty one years did, then and there, unlawfully, and under promise of marriage, seduce and have illicit connection with B, then being an unmarried female of previously chaste character.

SEDUCTION BY GUARDIAN OF WARD.

On at A, then being the guardian of B, then and there unlawfully did seduce (*or* "did have illicit connection with") the said B, his ward.

SEDUCTION OF FACTORY EMPLOYEE.

On at A, unlawfully did seduce (*or* "did have illicit connection with") B, a woman of previously chaste character, and then being under the age of twenty one years, to wit, of the age of years, and then also being in the employment of the said A in the said A's factory (*or* "mill," *or* "workshop").

PROCURING DEFILEMENT OF A WOMAN UNDER AGE.

On at A, unlawfully did procure (*or* "did attempt to procure") B, a girl, (*or* "woman"), then under the age of twenty one years, to wit, of the age of years, and not being a prostitute nor of known immoral character, to have unlawful carnal connection with another person (*or* "other persons").

ENTICING A WOMAN UNDER AGE TO PROSTITUTION

On at A, unlawfully did inveigle, (*or* "entice"), B., a girl, (*or* "woman"), then under the age of twenty-one years, to wit, of the age of years, and not being a prostitute nor of known immoral character, to a house of ill-fame, (*or* "assignation"), for the purpose of illicit intercourse (*or* "prostitution").

CONCEALING A WOMAN SO ENTICED.

On at A, unlawfully and knowingly did conceal in a house of ill-fame, (*or* "assignation"), B, a girl, (*or* "woman"), then being under the age of twenty-one years, to wit, of the age of years, and not being a common prostitute nor of known immoral character, and she the said B, having been unlawfully inveigled, (*or* "enticed") to the said house of ill-fame (*or* "assignation") for the purpose of illicit intercourse (*or* "prostitution".)

PROCURING A WOMAN TO BECOME A PROSTITUTE.

On at A, unlawfully did procure (*or* "attempt to procure"), B, a woman (*or* "girl") to become, within Canada, (*or* "out of Canada"), a common prostitute.

PROCURING A WOMAN TO LEAVE CANADA FOR PROSTITUTION ELSEWHERE.

On at A, unlawfully did procure (*or* "attempt to procure"), B., a woman (*or* "girl") to leave Canada with intent that she should become an inmate of a brothel elsewhere.

PROCURING A WOMAN TO COME TO CANADA FOR PROSTITUTION

On at A, unlawfully did procure (*or* "attempt to procure"), B., a woman (*or* "girl") to come to Canada from abroad with intent that she should become an inmate of a brothel in Canada.

PROCURING A WOMAN'S DEFILEMENT BY THREATS.

On at A unlawfully and by threats (*or* "intimidation") did procure (*or* "attempt to procure") B, a woman (*or* "girl") to have unlawful carnal connection within Canada (*or* "out of Canada")

PROCURING A WOMAN'S DEFILEMENT BY FALSE PRETENCES.

On at A, by false pretences (*or* "false representations") unlawfully did procure B, a woman, (*or* "girl"), not being a prostitute nor of known immoral character, to have unlawful carnal connection within Canada (*or* "out of Canada").

DEFILING BY MEANS OF DRUGS.

On at A, unlawfully did apply (*or* "administer") to and cause to be taken by B, a woman, (*or* "girl"), a certain drug to wit, (*or* "some intoxicating liquor," *or* some other matter or thing, *as the case may be*), with intent to stupefy (*or* "overpower") her the said B, so as thereby to enable the said A (*or* "a certain man, to wit, C,") to have unlawful carnal connection with her the said B.

CONSPIRACY TO INDUCE A WOMAN TO COMMIT ADULTERY OR FORNICATION.

On at A, and B, unlawfully did conspire, combine, confederate, and agree together, unlawfully, and by false pretences, false representations, and other fraudulent means to induce C, a woman, to commit adultery (*or* "fornication") with D.

A COMMON NUISANCE ENDANGERING LIFE &c. (1)

At on , and on and at divers other days and times, before and since that date. A, unlawfully and injuriously did and he does yet continue to (*set out the particular act or omission complained of*) and thereby unlawfully did commit and does continue to commit a common nuisance endangering the lives (*or* "safety" *or* "health") of the public.

A COMMON NUISANCE OCCASIONING PERSONAL INJURY. (2)

At on and on and at divers other days and times before and since that date, A, unlawfully, and injuriously

(1) See comments under articles 191 and 192, *ante*, pp. 115, 116.
(2) See comments under articles 191 and 192, *ante*.

did, and he does yet continue to (*Set out the particular act or omission complained of*) and thereby unlawfully did commit and does continue to commit a common nuisance by which the public were and are obstructed in the exercise or enjoyment of a right common to all Her Majesty's subjects, to wit, (*Set out the common right obstructed*) and which common nuisance did at aforesaid on the day of occasion actual injury to the person of B.

OR.

At on . and on and at divers other days and times before and since that date, A, unlawfully and injuriously did and he does yet continue to (*Set out the particular act or omission complained of*) and thereby unlawfully did commit and does continue to commit a common nuisance, endangering the property (*or* "comfort") of the public and which common nuisance did at aforesaid on the day of occasion actual injury to the person of B.

KEEPING A BAWDY-HOUSE.

At on and on and at divers other days and times since that date A and B, the wife of the said A, unlawfully did keep and maintain a disorderly house, to wit, a common bawdy-house by keeping and maintaining a certain house [*or* "room," *or* "set of rooms" *etc.*] situate and being , for purposes of prostitution.

KEEPING A COMMON GAMING-HOUSE.

At on , and on and at divers other days and times since that date, A, (*or* "A, B, and C") unlawfully did keep and maintain a disorderly house, to wit, a common gaming house by keeping and maintaining for gain a certain house [*or* "room" *etc.*] situate and being to which persons did and do resort for the purpose of playing at games of chance.

OR.

(*Commence as above*) unlawfully did keep and maintain a disorderly house to wit, a common gaming house, by keeping (*or* "using") for gain, a certain house (*or* "room" *etc.*), situate and being for playing therein at games of chance and mixed games of chance and skill, and in which a bank was and is kept by one or more of the players exclusively of the others. (*or in which, in the games played therein, the chances are not alike favorable to all the players*).

TABLE OF OFFENCES UNDER TITLE IV.

INDICTABLE OFFENCES.

No.	Art.	Offence.	Punishment.	Tribunal.
1	170	Blasphemous libels	One year	Either Sup. Ct. Cr. Juris. or General or Quarter Sessions.
2	171	Obstructing officiating clergyman	Two years	do
3	172	Violence to officiating clergyman	Two years	do
4	174	Unnatural offence	Life	do
5	175	Attempt to commit sodomy	Ten years	do
6	176	Incest	Fourteen years and whipping	do
7	178	Acts of gross indecency	Five years	do
8	179	Publishing obscene matters	Two years	do
9	180	Posting immoral books, etc	Two years	do
10	181	Seduction of girls under sixteen	Two years	do
11	182	Seduction under promise of mariage	Two years	do
12	183	Seduction of a ward or a servant, factory girl, etc	Two years	do
13	184	Seduction of female passengers on vessels	$400 fine or one year	do
14	185	Unlawfully defiling women	Two years with hard labor	do
15	186	Parent or guardian procuring defilement of girl	Fourteen years and five years	do
16	187	Householders permitting defilement of girls	Ten years and two years	do
17	188	Conspiracy to defile	Two years	do
18	189	Carnally knowing idiots	Four years	do
19	190	Prostitution of Indian women	$100 fine or six months	do
20	192	Common nuisance	One year, or fine. (See Art. 934)	do
21	194	Selling things unfit for food	One year	do
22	198	Keeping disorderly house (bawdy-house, gaming house) (1)	One year	do
23	201	Gaming in stocks, etc	Five years and $500 fine	do
24	202	Frequenting bucket-shops	One year	do
25	203	Gambling in public conveyances (railways, steamers, etc.) (2)	One year	do
26	204	Betting and pool-selling	One year and $1000 fine	do
27	205	Lotteries	Two years and $2000 fine	do
28	206	Misconduct towards human remains	Five years	do

On reference to articles 538, 539 and 540, it will be seen that all the indictable offences mentioned in Title IV, and here tabulated, are triable by a Court of General or Quarter Sessions, which has concurrent jurisdiction, over them, with the Superior Courts of Criminal Jurisdiction.

See Article 958, *post*, empowering Tribunal, in addition to infliction of punishment, to order security for the convicted offender's future good behaviour, and also providing that on conviction for any offence punishable with imprisonment for five years or less the offender may be fined in addition to or in lieu of any punishment otherwise authorized.

(1) These offences, as well as being indictable, may also be tried summarily under articles 783 and 784, *post* (which see).

(2) Railway conductors, steamboat officers, station masters, etc., are obliged to arrest and prosecute offenders under this article and are liable to $100 fine, for neglect to do so.

Every company or other owner of a railway car or steamboat must keep a copy of the above article posted up conspicuously in their railway car or steamboat, and are liable, for neglect to do so, to $100 penalty.

NON-INDICTABLE OFFENCES.

No.	Art.	Offence.	Punishment.	Tribunal.
1	173	Disturbing public worship	$50 fine, or one month in default	Summary.
2	177	Indecent acts	$50 fine, or six months, —with or without hard labor, — or both fine and imprisonment	Summary (2 justices)
3	199	Playing or looking on in gaming-house	$100 penalty, *or* two months in default	do do
4	200	Wilfully preventing obstructing or delaying officer entering disorderly house	$100 fine *and* six months with or without h. l.	do do
5	203[3]	Railway or steamboat officer neglecting to arrest persons gambling in their conveyances	$100 penalty	Summary.
6	203[5]	Neglect of railway or steamboat company, etc., to post up in their conveyances article 203 against gambling	$100 penalty	Civil Court. (See Art. 929, *post*).
7	207 208	Vagrancy, including: Publicly exposing indecent show; begging; loitering; swearing, being drunk and disorderly, etc., in street; defacing signs, breaking windows, etc.; common prostitution, night-walking, etc.; keeping or being inmate of a disorderly house, or frequenting disorderly houses; living by gaming or crime or by the avails of prostitution	$50 fine, or six months (with or without h. l.), or both	Summary (two justices.)

LIMITATION OF TIME FOR PROSECUTING OFFENCES UNDER TITLE IV.

Art.	181	Seduction of girls under sixteen:	One year.	(See Art. 551 (*c*).
"	182	Seduction under promise of marriage:	do	do
"	183	Seduction of a ward, mill girl, &c:	do	do
"	185	Unlawfully defiling women:	do	do
"	186	Parent or guardian procuring defilement of ward or child:	do	do
"	187	House holders permitting defilement of girls on their premises:	do	do

NOTE.—See article 930, which prescribes by two years, all actions, suits or informations (not otherwise expressly limited), when the same are for the recovery of the penalties or forfeitures referred to in article 929 *post*.

TITLE V.

OFFENCES AGAINST THE PERSON AND REPUTATION.

PART XVI.

DUTIES TENDING TO THE PRESERVATION OF LIFE.

209. Duty to provide necessaries of life.—Every one who has charge of any other person unable, by reasons either of detention, age, sickness, insanity or any other cause, to withdraw himself from such charge, and unable to provide himself with the necessaries of life, is, whether such charge is undertaken by him under any contract, or is imposed upon him by law, or by reason of his unlawful act, under a legal duty to supply that person with the necessaries of life, and is criminally responsible for omitting, without lawful excuse, to perform such duty if the death of such person is caused, or if his life is endangered, or his health has been or is likely to be permanently injured, by such omission.

210. 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.

211. Every one who, as master or mistress, has contracted to provide necessary food, clothing or lodging for any servant or apprentice *under the age of sixteen years* is under a legal duty to provide the same, and is criminally responsible for omitting, without lawful excuse, to perform such duty, if the death of such servant or apprentice is caused, or if his life is endangered, or his health has been or is likely to be permanently injured, by such omission.

The Royal Commissioners in referring to the provisions of sections of their draft code nearly identical with the three foregoing articles, say: "As homicide and the infliction of bodily injury may be effected as well by an omission to discharge a legal duty as by an illegal act, it is necessary to begin by defining

the legal duties tending to the preservation of life, the neglect of which is criminal. Section 161, (corresponding with our article 214, *ante*), is a re-enactment of 24 and 25 Vict., c. 100, s. 26 which was itself a re-enactment of 14 and 15 Vict., c. 11. That statute was passed in the excitement consequent on the case of R. v. Sloane, (1) and was framed so as to embrace all cases where there was a contract to supply a servant of whatever age with food, clothing, and lodging. It has been thought better to limit it to servants and apprentices under the age of sixteen, but it is right to point out that this is not the existing law. Section 160, (corresponding with our article 210), puts the head of a family under the same criminal responsibility towards members of his household under the age of sixteen as a master is to a servant of the same age."

Under article 215, *post*, the punishment for neglecting or refusing to perform any of the duties specified and defined in articles 209, 210, and 211 is three years imprisonment, unless the neglect or refusal amounts to culpable homicide; and then, of course, it would be punishable as such.

Articles 210 and 211 make several changes in the old law as contained in the R. S. C. chap. 162 (now repealed), as will be seen by section 19, of that act, which reads as follows:

"Every one who, being legally liable, either as a husband, parent, guardian, or committee, master or mistress, nurse or otherwise, to provide for any person as wife, child, ward, lunatic or idiot, apprentice or servant, infant or otherwise, *necessary food, clothing and lodging*, wilfully and without lawful excuse, refuses or neglects to provide the same, or unlawfully or maliciously 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, is guilty of a misdemeanor, and liable to three years' imprisonment."

See article 217, *post*, as to causing bodily harm to an apprentice or servant by a master.

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.

See article 57, *post*, pp. 34, 35.
See also comments upon *necessity*, *ante*, p. 13.

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.

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 crimi-

(1) Annual Register vol. 92, p. 144.

nally responsible for the consequences of omitting, without lawful excuse, to perform that duty.

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.* (*As amended by* 56 *V., c.* 32.)

It will be readily seen, that in a prosecution under this article for neglecting or refusing to perform any of the duties specified in article 210, it must be alleged in the indictment and established in evidence that the neglect or refusal was without lawful excuse and that thereby the life of the person neglected or omitted to be provided with necessaries is endangered or his or her health permanently injured or likely to be permanently injured.

216. Neglecting children under two years old.—Every one is guilty of an indictable offence and liable to three years' imprisonment who unlawfully abandons or exposes any child under the age of two years, whereby its life is endangered, or its health is permanently injured.

2. The words "abandon" and "expose" include a wilful omission to take charge of the child on the part of a person legally bound to do so, and any mode of dealing with it calculated to leave it exposed to risk without protection. R.S.C., c. 162, s, 20.

The old law (R.S.C. c. 162, s. 20) was as follows:

"Every one who unlawfully abandons or exposes any child, being under the age of two years, whereby the life of such child is endangered, or the health of such child has been, or is likely to be, permanently injured, is guilty of a misdemeanor, and liable to three years' imprisonment."

Section 27 of the Imperial Statute (24 and 25 Vict., c. 100) is as follows:

"Whosoever shall unlawfully abandon or expose any child, being under the age of two years, whereby the life of such child shall be endangered, or the health of such child shall have been or likely to be permanently injured, shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be kept in penal servitude for the term of three years."

In an English case, the prisoners were charged by an indictment framed under this section with having abandoned and exposed a child under two years of age, whereby its life was endangered and the following facts were established against them.

One of the defendants was the mother of a weakly bastard child, which,—when it was about five weeks old,—both prisoners put in a hamper, at S., the child, when so put in the hamper, being wrapped up in a shawl and being then packed in the hamper with shavings and cotton wool. The mother then took the hamper containing the child from S., to the booking office of the railway station at M. (a distance of about four miles), and there left it, having paid the carriage of the hamper to G. The hamper was addressed to the lodging of the child's father at G., and he had told the mother, previous to the child's birth, that if she sent it to him he would keep it. The mother told the railway clerk to be careful of the hamper and to send it by the next train which was due to leave the station at M., in ten minutes from the time of her depositing it there. Upon the address were the words, "with care: to be delivered immediately." The hamper was duly sent by train and delivered at its address in G., in a little less than an hour from its being despatched from M. On the hamper being opened the child was alive, and lived for three weeks afterwards, when it died from causes not attributable

to the conduct of either of the prisoners. Upon these facts it was held that there was an abandonment and exposure endangering the life of the child: and the prisoners were found guilty. (1)

In another case, a woman, who was living apart from her husband, and who had the custody of their child, brought it and left it outside the father's door, telling him she had done so. The father knowingly allowed the child to remain outside his door from 7 p. m., till 1 a. m., when it was found, cold and stiff, by a constable who removed it. It was held that, although the father had not the actual custody and possession of the child yet as he was legally bound to provide for it, his allowing it to remain where he did was an abandonment and exposure by him whereby the child's life was endangered within the meaning of 24-25 V., c. 100, s. 27. (2)

217. Causing bodily harm to apprentices or servants.—Every one is guilty of an indictable offence and liable to three years' imprisonment who, being legally liable as master or mistress to provide for any apprentice or servant, unlawfully does, or causes to be done, any bodily harm to any such apprentice or servant so that the life of such apprentice or servant is endangered or the health of such apprentice or servant has been,, or is likely to be, permanently injured. R.S.C., c. 62, s. 19.

The reference under this article is evidently a clerical error. It should be R. S. C. c. 162.

The corresponding Imperial enactment on this subject is the 24 and 25 Vic., c. 100, sec. 26, which is as follows:

"Who soever being legally liable either as master or mistress to provide for any apprentice or servant necessary food clothing or lodging, shall wilfully and without lawful excuse refuse or neglect to provide the same, or shall unlawfully and maliciously do or cause to be done any bodily harm to any such apprentice or servant, so that the life of such apprentice or servant shall be endangered, or the health of such apprentice or servant shall have been or shall be likely to be permanently injured, shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to be kept in penal servitude for the term of three years."

Upon this clause Archbold makes the following remarks: "Whether it be "necessary to prove that, by such *refusal or neglect to provide*, the prosecutor's "life was endangered or his health was or was likely to be permanently injured, "depends upon the construction which is to be put upon the statute. If the "words '*so that the life of such person shall be endangered*,' etc., apply to all "the preceding matter, such proof will be necessary; if only to the branch of "the section which relates to the actual doing of bodily harm to the apprentice "or servant, such proof will be unnecessary. Until there has been some decision "on the subject it will be safer to introduce, into the indictment, the allegation, "'*so that the life of the said was thereby endangered*.' "and to be prepared with evidence to sustain it. It would seem indeed to be "the better opinion that the words '*so that the* life of such person shall be "endangered, etc,' override all the preceding matter, otherwise a mere single "wilful refusal to provide a dinner would be within the clause. Upon an indict- "ment for unlawfully and maliciously assaulting an apprentice or servant it is "clear that such allegation and proof are necessary."

It will be observed that the uncertainty which Archbold seems to find in the English enactment arises from the fact of two offences, *neglecting to provide necessaries* and *doing bodily harm* to an apprentice or servant being included in one section. In the present code this possible uncertainly has been avoided,

(1) R. v Falkingham, L. R., 1 C. C. R., 222: 39 L. J. (M. C.) 47.
(2) R., v. White, L. R., 1 C C. R. 311; 40 L. J., (M C.) 134; Arch. Cr. Pl. and Ev. 21 Ed., pp. 792, 793.

by separating and dealing with the two offences in different articles, the offence or offences of a parent or a master neglecting the duties imposed upon them by articles 210 and 211 respectively being dealt with under article 215, *ante*, and the offence of a master doing bodily harm to an apprentice or servant being dealt with by the above article 217. So that, with us, whether the charge against the master be for neglecting to provide necessaries to his apprentice or for doing such apprentice or servant bodily harm, there can be no doubt that the indictment must allege, and it must be proved that the life of the apprentice is endangered, or that his or her health has been, or is, or is likely to be permanently injured.

PART XVII.

HOMICIDE.

218. Homicide is the killing of a human being by another, directly or indirectly, by any means whatsoever.

Upon this part of the law as contained in the English Draft Code the Royal Commissioners report as follows:

"The Draft Code deals next with murder, manslaughter, and some other offences to which we will refer specifically.

"Many of the doctrines of the common law bearing upon this subject relate equally to murder and manslaughter. Both the Draft Code and the Bill accordingly deal with homicide generically, and ascertain the cases in which it is culpable, before dealing specifically with murder and manslaughter. The Draft Code preserves the rule, of the common law, that to render the homicide culpable, death must take place within a year and a day of the injury. It was thought desirable to fix some limit, and no sufficient reason occurred to us for departing from the ancient rule.

"Having defined culpable homicide the Draft Code proceeds to the problem of defining murder and manslaughter.

"The common law definition of murder is 'unlawfully killing with *malice* aforethought'; and manslaughter may, in effect, be defined as 'unlawful killing *without* malice aforethought.' The objection to these definitions is that the expression 'malice aforethought' is misleading. This expression, taken in a popular sense, would be understood to mean that in order that homicide may be murder the act must be premeditated to a greater or less extent, the jury having in each case to determine whether such a degree of premeditation existed as deserved the name.

"This definition if so understood would be obviously too narrow, as, without what would commonly be called premeditation, homicide might be committed which would involve public danger and moral guilt in the highest possible degree. Of course it can be pointed out that every intentional act may be said to be done aforethought, for the intention must precede the action. But even with this explanation the expression is calculated to mislead any one but a trained lawyer.

"The inaccuracy of the definition is still more apparent when we find it laid down that a person may be guilty of murder who had no intention to kill or injure the deceased or any other person, but only to commit some other felony, and the injury to the individual was a pure accident. This conclusion was arrived at by the doctrine of constructive or implied malice. In this case, as in the case of other legal fictions it is difficult to say how far the doctrine extended. We do not propose on the present occasion to enter upon a discussion of this subject. It was carefully considered before a committee of the

House of Commons sitting on a Bill for the definition of homicide, introduced by the late Mr. Russell Gurney, in 1874. It was also considered by the Commission on Capital Punishments, which reported in 1866. Each of these bodies reported that the present condition of the law was unsatisfactory, though neither arrived at a definition which was considered satisfactory.

"The present law may, we think, be stated with sufficient exactness for our present purpose somewhat as follows:—Murder is culpable homicide by any act done with malice aforethought. Malice aforethought is a common name for all the following states of mind:—

"(*a.*) An intent,—preceding the act,—to kill or to do serious bodily injury to the person killed or to any other person:

"(*b.*) Knowledge that the act done is likely to produce such consequences, whether coupled with an intention to produce them or not:

"(*c.*) An intent to commit any felony;

"(*d.*) An intent to resist an officer of justice in the execution of his duty.

"Whether (*c*) is too broadly stated or not is a question open to doubt, but Sir Michael Foster, perhaps the highest authority on the subject says (p. 258). 'A. shooteth at the poultry of B., and by accident killeth a man. If his 'intention was to steal the poultry, which must be collected from the circums-'tances, it will be a murder, by reason of that felonious intent: but if it was 'done wantonly and without that intention, it will be barely manslaughter."

"It seems to us that the law upon this subject ought to be freed from the element of fiction introduced into it by the expression 'malice aforethought,' although the principle that murder may, under certain circumstances be committed, in the absence of an actual intention to cause death, ought to be maintained. If a person intends to kill and does kill another, or if, without absolutely intending to kill, he voluntarily inflicts any bodily injury known to be likely to cause death, being reckless whether death ensues or not, he ought in our opinion to be considered a murderer, if death ensues.

"For practical purposes we can make no distinction between a man who shoots another through the head expressly meaning to kill him, a man who strikes another a violent blow with a sword, careless whether he dies of it or not, and a man who, intending for some object of his own, to stop the passage of a railway train, contrives an explosion of gunpowder or dynamite under the engine, hoping indeed that death may not be caused, but determined to effect his purpose whether it is so caused or not.

"This is the general object kept in view both in the Draft Code and in the Bill, but there is some difference in the extent to which they go. There is no difference as to the cases in which the death of the person killed or of some other person is intended. The Bill included in the definition of murder all cases in which the offender *intended* to cause, or knew that he probably would cause '*grievous bodily harm*' to any person. The Draft Code includes all such cases, substituting the expression '*bodily injury known to the offender to be 'likely to cause death*' for '*grievous bodily harm*'; which to some extent narrows the definition given in the Bill. On the other hand the Draft Code includes all cases in which death is caused by the infliction of 'grievous bodily injury' for the purpose of facilitating the commission of certain heinous offences. All these cases would fall within the definition of murder given in the Bill, according to which it is murder to kill by the intentional infliction of grievous bodily harm irrespectively of the purpose for which it is used. Lastly, it is provided (by the Draft Code) that killing by the administration of stupefying things or by wilfully stopping the breath for the purpose, in either case, of committing any of the specified offences, (1) shall be murder *whether the offender knows or not that death is likely to ensue.* According to the provisions of

(1) The specified offences are the same as those specified, in the same connection, by the present code (see article 227, *post*), namely, Treason, Treasonable offences, Assaults on the Queen, Inciting to Mutiny, Piracy, Piratical Acts, Escapes, Rescues, Resisting lawful Apprehension, Murder, Rape, Forcible Abduction, Robbery, Burglary, Arson.

the Bill these cases would amount to murder only if the offender knew their danger.

"The difference between the Draft Code and the Bill upon the whole comes to this. A. in order to facilitate robbery, pushes something into B's mouth to stop his breath and thus prevent him from crying out; the death of B results. This is murder according to the Draft Code. According to the Bill it is murder if A. knew that such an act would probably cause death; manslaughter if he did not.

"A few years ago a case occurred in the Western Circuit (1) which illustrates the principle on which this portion of the Draft Code is framed better than any hypothetical case. An innocent girl on her way to church had to pass over a stile into a narrow wooded lane and then go out of it by a stile on the other side. A ruffian who knew this lay in wait for her, muffled her head in a shawl to stifle her cries and proceeded to drag her down the lane towards a wood. She died before she reached it. He was executed for the murder. It is plain he did not mean to kill her; indeed his object was frustrated in consequence of her not reaching the wood alive, and he probably was not aware that stifling her breath for so short a time was dangerous to life; but as the law at the time was and now is, the death having been occasioned by violence used to facilitate the commission of a rape, the offence was murder. And we believe there are few who would not think the law defective if such an offence was not murder.

"Again, A stabs B in the leg, not intending to kill him; B dies. According to the Bill this would be murder if the jury thought the act showed an intent to do grievous bodily harm, or if without such intent it was done with knowledge that it would probably cause death or grievous bodily harm. According to the Draft Code it would be murder if the jury thought the act was meant to cause B an injury known to A to be likely to cause death, he being reckless whether it caused death or not. It will thus be seen that the Bill and the Draft Code approach each other very closely."

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 child is homicide when it dies in consequence of injuries received before, during, or after birth.

This seems to be a statement of the common law on the subject, (2) in accordance with which it has been held that a child within its mother's womb is not a being upon whom culpable homicide can be committed. It must be born. (3). That is to say, in order to be the subject of homicide it must, if an injury be inflicted upon it while in its mother's womb have afterwards *completely proceeded in a living state from its mother's body*, and then if it afterwards die through the injury previously received the injury so inflicted and the subsequent death would constitute homicide.

Coke says: "If a woman be quick with child, and by a potion or otherwise killeth it in her womb, or if a man beat her whereby the child dieth in her body and she is delivered of a dead child, this is a great misprision, and no murder; but if the child be born alive and dieth of the potion, battery, or other cause, this is murder." (4)

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(1) Reg. v. Gilbert, known as the Fordingbridge murder. See "The Times," 19 July 1862.

(2) Rex v. Crutchley, 7 C. & P. 814; Rex v. Sellis, 7 C. & P. 850; Rex v. Poulton, 5 C. & P. 329; Rex v. Reeves, 9 C. & P. 25; Reg. v. Trilœ, C. & M. 650; 2 Moo., 260.

(3) Rex v. Brain. 6 C. & P. 349; 2 Bish. New Cr. L. Com., ss. 632, 633.

(4) 3 Inst. 50; *See* also Reg. v. West, 2 Car. & K. 784; Rex v. Senior, 1 Moo. 346; 2 Bish. New Cr. L. Com., s. 633.

220. Culpable homicide.—Homicide may be either culpable or not culpable. Homicide is culpable when it consists in the killing of any person, either by an *unlawful act* or by an *omission, without lawful excuse, to perform or observe any legal duty*, or by both combined, or by causing a person, by *threats or fear of violence*, or by *deception*, to do an act which causes that person's death, or by *wilfully frightening* a child or sick person.

2. Culpable homicide is either murder or manslaughter.

3. Homicide which is not culpable is not an offence.

To constitute culpable homicide under the terms of this article there must be.

1. An unlawful act done ; or

2. An omission, *without lawful excuse*, to perform or observe a legal duty ; or

3. (*a*) A threatening of violence, (*b*) an arousing of fear of violence, or (*c*) the use of deception, causing the person, so *threatened*, or *put in fear*, or *deceived*, as the case may be, to do an act causing his or her death ; or

4. A wilful frghtening of a child or sick person.

In an English case, before *Denman*, J., a man who had frightened a child to death was convicted of manslaughter. (1)

The following case, (although the injury caused did not result in loss of life) is an illustration of the principle upon which is based that part of the above article which makes it culpable homicide in a person who either by threatening violence towards, or by creating fear or violence in another, causes that other to do an act resulting in his or her death.

A woman in order to escape from the violence of her husband, who had used threats against her life, got out of a window, and in so doing fell to the ground and broke her leg. The husband was convicted of having wilfully and maliciously inflicted grievous bodily harm on his wife. *Held*, correct. Lord Coleridge, C. J., said : "I am of opinion that the conviction in this case is correct, and that the sentence should be affirmed. The principle seems to me to be laid down quite fully in *Reg.* v. *Martin*, 8 Q. B. Div. 54 ; 14 Cox C. C. 633. There, this court held that a man who had either taken advantage of or had created a panic in a theatre, and had obstructed a passage, and had rendered it difficult to get out of the theatre, in consequence of which a number of people were crushed, was answerable for the consequences of what he had done. Here, the woman came by her mischief by getting out of the window—I use a vague word on purpose—and in her fall broke her leg. Now that might have been caused by an act which was done accidentally or deliberately, in which case the prisoner would not have been guilty. It appears from the case however that the prisoner had threatened his wife more than once, and that on this occasion he came home drunk, and used words which amounted to a threat against her life, saying, 'I'll make you so that you can't go to bed ;' that she, rushing to the window, got half out of the window, when she was restrained by her daughter. The prisoner threatened the daughter, who let go, and her mother fell. It is suggested to me, by my learned brother, that supposing the prisoner had struck his daughter's arm without hurting her, but sufficiently to cause her to let go, and she had let her mother fall, could anyone doubt but that that would be the same thing as if he had pushed her out himself? If a man creates in another man's mind an immediate sense of danger which causes such person to try to escape, and in so doing he injures himself, the person who creates such a state of mind is responsible for the injuries which result. I think that in this case there was abundant evidence that there was a sense of immediate danger in the mind of the woman, caused by the acts of the prisoner, and that her injuries resulted from what that sense of danger caused her to do." The other judges concurred. (2)

See also, (similar case), R. v. Evans, 1 Russ. Cr. 5 Ed. 651.

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(1) R., v. Towers, 12 Cox C. C. 530.

(2) Reg. v. Halliday, 51 L. J. Rep. (N. S.) 701.

Non-culpable homicide.—Besides the above divisions of homicide into *culpable* and *non-culpable*, and of culpable homicide into *murder* and *manslaughter*, homicide which is not culpable may be divided into that which is (*a*) *justifiable*, and that which is (*b*) *excusable*. (1)

Justifiable homicide.—Blackstone subdivides justifiable homicide into two classes, (2) namely:—

1. Homicide which is done under the necessity which arises in the exercise of an office, which makes it compulsory,—in executing public justice, under judicial command,—to put to death a malefactor who has forfeited his life by the laws and verdict of his country (3). In this case, however, the law must *require* it; it must be done by authority of a judicial sentence, or it is not justifiable, and, therefore, wantonly to kill the greatest of malefactors deliberately, uncompelled and extra-judicially, is murder.

2. The other class of justifiable homicide is, according to Blackstone, that which occurs in the advancement of public justice, and in which the act, though not commanded, is permitted; as where the killing happens in preventing crime, (4) or in the arrest of persons guilty or accused of crimes, (5) or in preventing escapes or rescues from arrest or from custody, (6) or in suppressing riots &c. (7)

As already remarked (8) the general rule allowing the use of necessary force to prevent the commission of a criminal offence is, by article 44, *ante*, made to include the prevention of any offence for which under the present code an arrest may be made without warrant. As the ground of justification of homicide committed in preventing a criminal offence, accompanied with violence, is that of necessity, the necessity must continue to the time of the killing, or it will not justify it; and the killing of an offender, for instance, after being properly secured, and after all apprehension of danger has ceased, would not be justifiable but it would be murder, unless,—when it was done,—the blood was still hot from the contest or pursuit; and then, on that account, it might be held to be only manslaughter. (9)

Excusable Homicide. — Blackstone divides excusable homicide into, 1, Homicide *per infortunium* or misadventure; and 2. Homicide in self-defence, or *se defendendo*.

Homicide *per infortunium*, or misadventure, is such as occurs where a man, in the doing of a lawful act, without any negligence and with no intention to injure, unfortunately kills another.

ILLUSTRATIONS.

A is at work with a hatchet, the head of which flies off and kills B, a bystander. This is excusable homicide by misadventure. (10)

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(1) Broom's Com. L. 910.

(2) 4 Bl. Com. 178, 179.

(3) See articles 15, 18, 19 and 31, *ante* pp. 16, 17 and 24, (and comments), as to justification and powers of ministerial officers in the execution of judicial sentences &c.

(4) Reg. v. Huntley, 3 Car. & K. 142; See article 44, (and comments), *ante* p. 28, as to justification of force used in preventing the commission of offences.

(5) See article 31, *ante* p. 24, as to justification of force used in making arrests &c.

(6) See articles 33, 34, 35, 36, and 37, *ante* p. 25, as to justification of force used in preventing escapes and rescues.

(7) See articles 40, 41, 42, 43, 83 and 84 (and comments), *ante* pp. 27, 28 and pp. 52 and 53, as to suppression of riots.

(8) See *ante* p. 29.

(9) 1 East P. C. c. 5, s. 60, p. 293; 4 Bl. Com. 185; 1 Hale 485; 1 Russ. Cr. 5 Ed. 852. *See* also Rex v. Scully, 1 C. & P. 319.

(10) 1 Hawk, P. C., c. 29, s. 2.

A, a person qualified to keep a gun, is shooting at a mark, and undesignedly kills B. A is excused.

A parent or a master who, in moderately correcting his child, or his apprentice or servant, happens to occasion his death, is excused, on the ground that the killing is only misadventure. For the act of correction is lawful; but if he exceeds the bounds of moderation, either in the manner, the instrument, or the quantity of punishment, and death ensues, it is manslaughter at least, and in some cases (according to the circumstances) murder; for the act of immoderate correction is unlawful. For instance, where an apprentice, on being chided by his master for neglecting some work, made a sharp answer, and the master struck and killed the apprentice with a bar of iron which he had in his hand, it was held murder. (1)

A whips a horse upon which B is riding, in consequence of which the horse takes fright and before B can check him runs over and kills C, a child. This is accidental as to B, for he has done nothing unlawful; but it is manslaughter in A, for his act, being a trespass, was unlawful. (2)

Self-defence. — Homicide in self-defence, (sometimes also called *chance-medley*), is such as occurs where a man being violently attacked, is obliged to kill his assailant in order to save his own life. The right of self-defence proceeds from and is limited by necessity. It begins where necessity begins, and ends where necessity ends; and therefore the defending party in order to be excused must exercise only such power and apply only such instruments as will simply prove effectual; nothing more. For instance, one, on whom another is making a mere assault with his fist, must not instantly stab him. Even where another is meditating the taking of one's life, this extreme defence cannot lawfully be resorted to until some overt act is done in pursuance of the meditation; in other words till the danger becomes immediate. (3) Still, a person, assaulted by another who has threatened to kill him, is not, as a matter of course, required to run, and thus increase his danger by exposing himself to a repetition of his assailant's attempt when, with his back turned, he cannot so well resist or protect himself. And where an attack is made, with murderous intent, evinced by a sufficient overt act, the person attacked is under no duty to fly; but may stand his ground, and kill his adversary, if such killing become necessary in order to save himself. (4)

On this subject the Royal Commissioners in their report make the following remarks:

"We take one great principle of the common law to be that, though it sanctions the defence of a man's person, liberty and property against illegal violence, and permits the use of force to prevent crimes, to preserve the public peace, and to bring offenders to justice, yet all this is subject to the restriction that *the force used is necessary;* that is, that the mischief sought to be prevented could not be prevented by less violent means; and that the mischief done by, or which might reasonably be anticipated from the force used is not disproportioned to the injury or mischief which it is intended to prevent. This last principle will explain and justify many of our suggestions. It does not seem to have been universally admitted; and we have therefore thought it advisable to give our reasons for thinking that it not only ought to be recognised as the law in future, but that it is the law at present."

In an elaborate note at the end of their Report the Royal Commissioners have the following further remarks by way of argument on the subject:

"The proposition that the force used in defence of person, liberty or property must be proportioned to the injury or mischief which it is intended to prevent, is, in our opinion, one of great importance, yet it seems not to have commended itself to the minds of highly respectable authorities. We think it right, first, to

(1) Rex v. Grey, Kel. 64; Fost. 262. See article 55, *ante*, p. 34, and article 58, *ante*, p 35.
(2) 4 Bl. Com. 182, 183; 1 Hawk. P. C., c. 29, s. 3.
(3) 1 East P. C. 272.
(4) Fost. 273; 3 Inst. 56; 1 East P. C. 271.

call attention to the mode in which the subject was dealt with in Lord St. Leonard's Bill. The first part of sec. 88 of that Bill was as follows: 'Homi-'cide shall be justifiable where one, in lawful defence of his person, repels force 'by force, and, using no more violence than he has reasonable cause for 'believing to be necessary for the purpose of self-defence, kills the assailant.' Had this been passed unaltered into law, it would have justified every weak lad, whose hair was about to be pulled by a stronger one, in shooting the bully if he could not otherwise prevent the assault.

Again, sect. 90 says, 'Homicide shall be justifiable' (not merely reduced from murder to manslaughter) 'where one in defence of moveable property in his 'lawful possession, repels force by force, and, using no more force than he has 'reasonable cause for believing to be necessary for the defence of such property 'against wrong, kills the wrong-doer.' If two roughs, who each claimed a game-cock, and insisted on taking it home, quarrelled, and the weaker stabbed the stronger to the heart, this would, if made law, have justified the slayer, if he turned out to be the rightful owner of the bird, and could not otherwise have prevented its being taken away.

"And Section 91 says: 'Homicide shall be justifiable where one, in defence 'of house or land in his lawful possession, resisting a person, endeavouring by 'force to enter into or upon such house or land, repels force by force, and using 'no more force than he has reasonable cause for believing to be necessary for 'the defence of his possession, kills the wrong-doer.' It is the more singular that this last clause should have been drawn as it is, because Lord Tenterden in a case which at the time attracted much attention laid down law directly opposed to it. It was the case of R. v. Moir, tried before Lord Tenterden at Chelmsford. (1) Mr. Moir, having ordered some fishermen not to trespass on his land, took a short cut, and found the deceased and others persisting in going across. He rode up to them and ordered them back. They refused to go, and there was evidence of angry words and some slight evidence that the deceased threatened to strike Mr. Moir with a pole. Mr. Moir shot him in the arm and the wound ultimately proved fatal. Before the man died, or indeed was supposed to be in danger, Mr. Moir avowed and justified his act, and said that in similar circumstances he would do the same again. This land, he said, was his castle and as he could not without the use of fire-arms prevent the fishermen from persisting in their trespass, he did use them, and would use them again. Lord Tenterden took a very different view of the law. He told the jury that the prevention of such a trespass could not justify such an act, and he seems to have left to them as the only justification which on these facts could arise, the question whether the prisoner was in *reasonable apprehension of danger to his life*, from the threats of the deceased. Mr. Moir was found guilty of murder and executed.

"It seems to us strange that these startling provisions (in Lord St. Leonard's Bill) passed without observation through the Select Committee, and were unnoticed by any of the judges, except Mr. Justice Coleridge, who, however, did not dwell on them, but merely made them the subject of a passing remark.

"It would, of course, follow that if homicide, under the circumstances mentioned in these three sections, (of Lord St. Leonard's Bill) was justifiable, any less degree of violence however great, would be justifiable also; and such appears to have been the view of the law taken by the Commissioners who framed the first draft of the Indian Code, and who, in an eloquent passage directed to another purpose, say: 'That a man who deliberately kills another in order to 'prevent that other from pulling his nose should be allowed to go absolutely 'unpunished, would be most dangerous. The law punishes and ought to 'punish such killing. But we cannot think that the law ought to punish such 'killing as murder.' In this, we agree: the provocation would be sufficient, generally, to reduce the crime to manslaughter But they proceed: 'For the 'law itself has encouraged the slayer to inflict on the assailant any harm short 'of death which may be necessary for the purpose of repelling the outrage,—to 'give the assailant a cut with a knife across the fingers, which may render his

(1) R. v, Moir. Annual Register for 1830, vol. 72, p. 344.

'right hand useless to him for life, or to hurl him down stairs with such force 'as to break his leg. And it seems difficult to conceive that circumstances, 'which would be a full justification of any violence short of homicide, should 'not be a mitigation of the guilt of homicide. That a man should be merely 'exercising a right by fracturing the skull and knocking out the eye of the 'assailant, and should be guilty of the highest crime in the code if he kills the 'same assailant,—that there should be only a single step between perfect 'impunity and liability to capital punishment seems unreasonable. In a 'case in which the law itself empowers an individual to inflict any harm short 'of death, it ought hardly, we think, to visit him with the highest punishment 'if he inflicts death.'

"If we thought that the common law was such as is here supposed, we should without hesitation suggest that it should be altered. But we think that such is not and never was the law of England. The law discourages persons from taking the law into their own hands. Still the law does permit men to defend themselves. *Vim vi repellere licet modo fiat moderamine inculpatæ tutelæ, non ad sumendam vindictam, sed ad propulsandam injuriam.* And when violence is used for the purpose of repelling a wrong, the degree of violence must not be disproportioned to the wrong to be prevented, or it is not justified. (1)

"There is no case that we are aware of in which it has been held that homicide to prevent mere trespass is justifiable. The question raised has always been, whether it was murder, or reduced by the provocation to manslaughter. And when death has not ensued, the forms of pleading, which had the advantage of bringing the principles of law to a precise issue, show what the principle was. In an appeal of Mayhem, the form of plea of *son assault demesne* was that 'the appellant made an assault upon the appellee and him then and there 'would have beaten, wounded and maimed unless he had forthwith defended 'himself, against the appellant, and so the ill which the appellant suffered was 'from his own proper assault and in defence of the appellee (2):' Less than this was not a defence (3) In Handcock v. Baker, (4) a plea justifying the breaking of the plaintiff's dwelling house, assaulting him therein, beating him and imprisoning him, on the ground that plaintiff was about to kill his wife, and that all that was done was for the purpose of and necessary to prevent his doing so, was held good after verdict. And we take it to be clear that, even killing the intruding criminal, if necessary to prevent a crime of this magnitude, would be justifiable; but not if it were to prevent a common assault.

"But the defence of possession either of goods or land against a mere trespass not a crime, does not, strictly speaking, justify even a breach of the peace The party in lawful possession may justify gently laying his hands on the trespasser and requesting him to depart. If the trespasser resists, and in doing so assaults the party in possession, that party may repel the assault and for that purpose may use any force which he would be justified in using in defence of his person. As is accurately said in 1 Rolle's Abt. Trespass G. 8, 'a justification 'of a battery in defence of possession, though it arose in the defence of the 'possession, yet in the end it is the defence of the person.'

"Some misapprehension may have arisen from the numerous cases decided, on the 9 Geo. 4, c. 31, s. 11, in which persons indicted for wounding with intent to do grievous bodily harm were held entitled to an acquittal, on its coming out in evidence that there was an illegality or informality in an arrest, or some other provocation disproportioned to the degree of violence used (5). And it may have been supposed that these are authorities that the violence was absolutely justified. But this is from not observing that the effect of the enactment then in force, was that, if wounding was inflicted under such circumstances that, if death had ensued therefrom the offence would not have amounted to murder, the person indicted should be acquitted of felony. That provision was repealed

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(1) Co. Lit., 162a.
(2) Coke's Entries, 526.
(3) Cook v. Beale, 1 Ld. Ray. 176.
(4) Handcock v. Baker, 2 Bos. & P. 260.
(5) See R. v. Hood, 1 Moo., C. C 281.

in 1838, and since that time the course of practice has, we believe, been to leave it to the jury, with proper explanations and directions, to say whether the wounding was disproportionate to the injury which it was intended to prevent. The cases in which this doctrine has been acted on seem not to have been reported, with the exception of R. v. Hewlett (1), in which the point only incidentally arose. We think that it is good sense, and that it is the law; and if it is not the law, we submit that it ought to be made so."

The principle above contended for in relation to self-defence has been fully kept in view in articles 45 and 46 (2) of the present code, which articles are as follows:—

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

"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.

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

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.

Article 146 (see *ante*) punishes perjury with imprisonment for life, when it is committed in order to procure the conviction of a person for any crime punishable by death or imprisonment for life.

222. Death must be within a year and a day.—No one is criminally responsible for the killing of another unless the death take place within a year and a day of the cause of death. The period of a year and a day shall be reckoned inclusive of the day on which the last unlawful act contributing to the cause of death took place. Where the cause of death is an omission to fulfil a legal duty the period shall be reckoned inclusive of the day on which such omission ceased. Where death is in part caused by an unlawful act and in part by an omission, the period shall be reckoned inclusive of the day on which the last unlawful act took place or the omission ceased, which ever happened last.

223. Killing by influence on the mind.—No one is criminally responsible for the killing of another by any influence on the mind

(1) R. v. Hewlett, 1 F. & F. 91.

(2) See illustrations comments and authorities on these articles, *ante*, pp. 29 and 30.

alone, nor for the killing of another by any disorder or disease arising from such influence, *save* in either case by *wilfully frightening a child or sick person.*

See article 220, *ante.*

224. Acceleration of death.—Every one who, by any act or omission, causes the death of another kills that person, although the effect of the bodily injury caused to such other person be merely to accelerate his death while labouring under some disorder or disease arising from some other cause.

225. Killing, when death might have been prevented.—Every one who, by any act or omission, causes the death of another kills that person, although death from that cause might have been prevented by resorting to proper means.

226. Death following treatment of injury inflicted.—Every one who causes a bodily injury, which is of itself of a dangerous nature to any person, from which death results kills that person, although the immediate cause of death be treatment proper or improper applied in good faith.

ILLUSTRATIONS.

A strikes B, who, at the time she is so struck, is so ill that she could not have lived many weeks if she had not been struck. Through being struck she dies earlier than she otherwise would have done. A, having, by striking B, accelerated her death has killed her. (1)

A injures B's finger, B is advised by a surgeon to allow it to be amputated, refuses to do so, and dies of lockjaw. A has killed B. (2)

A wounds B in a duel. Competent surgeons perform on B an operation which they in good faith consider necessary; B dies of the operation, the surgeons being mistaken as to the necessity of the operation. A has killed B. (3)

PART XVIII.

MURDER, MANSLAUGHTER, &c.

227. Murder.—Culpable homicide is murder in each of the following cases:

(*a.*) *If the offender means to cause the death of the person killed*;

(*b.*) *If the offender means to cause* to the person killed any *bodily injury* which is *known* to the offender *to be likely to cause death*, and is reckless whether death ensues or not;

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(1) R. v. Fletcher, 1 Russ. Cr. 703; Bur. Dig. Cr. L. 213.
(2) R. v. Holland, 2 Moo. & R. 351; Bur. Dig. 213.
(3) R. v. Pym, 1 Cox, C. C. 339; 1 Russ. Cr. 702.

(*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.

228. Culpable homicide is also murder in each of the following cases, *whether the offender means or not death to ensue, or knows or not that death is likely to ensue:*

(*a.*) If he means to inflict grievous bodily injury for the purpose of facilitating the commission of any of the offences in this section mentioned, or the flight of the offender upon the commission or attempted commission thereof, and death ensues from such injury; or

(*b.*) If he administers any stupefying or overpowering thing for either of the purposes aforesaid, and death ensues from the effects thereof; or

(*c.*) If he by any means wilfully stops the breath of any person for either of the purposes aforesaid, and death ensues from such stopping of the breath.

2. The following are the offences in this section referred to:—*Treason* and the other offences mentioned in Part IV., of this Act, *piracy* and offences deemed to be piracy, *escape* or *rescue* from prison or lawful custody, *resisting lawful apprehension*, *murder*, (1) *rape*, *forcible abduction*, *robbery*, *burglary*, *arson*.

As Article 231 prescribes the punishment for murder I have taken the liberty of changing its position, numerally, by placing it next to the foregoing articles containing the definitions of murder.

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.

It will be seen by article 642, *post*, that, in future, "no one shall be tried upon any coroner's inquisition;" and article 568 provides, as follows:

"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*

(1) In the English Draft Code the Royal Commissionners have opposite to this word, "murder" in a corresponding section to the above, a marginal note in which they say. "This offence is inserted here to cover the case when the grievous bodily harm is done to some person other than the person intended to be murdered &c."

duty of the coroner to transmit to such magistrate or justice the depositions taken before him in the matter. Upon any such person being brought or appearing before any such magistrate or justice, he shall proceed in all respects as though such person had been brought or had appeared before him upon a warrant or summons."

The coroner's inquest is thus practically restricted to an enquiry into the cause of death; although the duty is imposed upon the coroner of causing the arrest of any persons affected by the finding of the inquisition and of bringing them before a magistrate for prosecution, when they are not already charged before one.

Two classes of murder.—The effect of the above articles 227 and 228 is to divide murder into two classes. One class includes cases in which the offender *means* either to cause death or to cause bodily injury likely, to his knowledge, to result in death; and the other class includes cases in which, in order to facilitate the commission of any of the offences specified in subsection 2 of article 228, the offender,—(whether *meaning or not meaning* to cause death, and whether knowing or not knowing that death is likely to ensue),—inflicts (*a*) grievous bodily injury upon, (*b*) administers drugs to, or (*c*) stops by any means, the breath of any one, and thereby causes death.

The principle upon which these articles are based is fully discussed by the Royal Commissioners, whose remarks thereon are already set out at pages 140 and 141 *ante*, (which see).

ILLUSTRATIONS.

A., with a revolver, deliberately shoots B through the head, killing him, and meaning to kill him. A commits murder.

A. meaning to maim or do bodily injury to B. but reckless whether he kills him or not, takes up an axe and chops off A's hand, knowing that such an injury is likely to cause death. B dies of the injury. A, is guilty of murder.

A. shoots at B. meaning to kill him, and kills C. instead. A. commits murder (1).

A. meaning to do bodily injury to B. and reckless whether he kills him or not, strikes at him with a sword-stick, meaning to wound his right arm, but B. avoids the thrust, by slipping away, and the weapon enters the body of and kills C. A. is guilty of murdering C. (2).

A. commits arson by burning the house of B. but does not mean to hurt anyone, and does not know that there is any one in the house. C. who happens to be in the house, is burnt to death. A. is guilty of murder; arson being a crime which A. ought to have known to be likely to cause death either to some one in the house itself, or to the occupants of adjoining premises or to those engaged in the dangerous work of extinguishing fires.

A. in order to rob B. does him some grievous bodily injury which results in his death. A commits murder, although he did not intend to kill B. and although he was not aware that the injury inflicted was likely to cause death.

A. having committed a burglary strikes at and inflicts grievous bodily injury on B. who intercepts his flight; B. dies of the injury thus received. A. is guilty of murder.

A. to facilitate the commission of rape upon B. administers to her a stupefying drug which kills her. A. commits murder, although he did not mean to cause death and did not know that the drug was likely to cause death.

A. in order to rob B. stops his breath by gagging him. B. dies in consequence. A. is guilty of murder, although he did not intend to kill B. and did not know that gagging was likely to cause death.

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(1) *Fost*, 261.
(2) R. v. Hunt, 1 Moo. C. C. 93.

Any killing, to be homicide must be the *killing* of one human being by another, either directly or indirectly and by any means whatsoever ; (1) that is, either by acts of omission, such as the neglect of the legal duties imposed by the articles of part XVI, or by acts of commission, as by poisoning, stabbing, shooting, choking, striking, kicking, starving or drowning, or in any of the other numerous ways in which human life may be taken ; but,—outside of the exceptions made by article 220, in reference to the wilful frightening of a child or sick person, and the causing a person by threats or fear of violence or by deception, to do something occasioning his own death,—no one (as stated by article 223), is criminally responsible for killing another by influence on the mind alone ; as, where a man either by working upon the fancy of another or by unkindness, puts him in such grief that he suddenly dies or contracts some sickness which brings on his death. (2)

The following are some instances of killing indirectly. Where A. carried B., his sick father against his will, in a severe season, from one town to another, by reason whereof he died, A. was held guilty of murder, on the ground that he must be presumed to have known that the probable consequence of his actions would be his father's death. (3) Where a harlot being delivered of a child left it in an orchard covered only with leaves, in which condition it was killed by a kite, she was held guilty of murder. (4) If A lays a trap or pitfall for B, whereby B. is killed, A is guilty of murder. (5)

Duelling.—As to duelling we have already seen that the parties to a prearranged fight with deadly weapons will be guilty of *murder*, as also their seconds, &c. (6)

229. Provocation.—Culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation.

2 Any wrongful act or insult, of such a nature as to be sufficient to deprive an ordinary person of the power of self-control, may be provocation if the offender acts upon it on the sudden, and before there has been time for his passion to cool.

3. Whether or not any particular wrongful act or insult amounts to provocation, and whether or not the person provoked was actually deprived of the power of self-control by the provocation which he received, shall be questions of fact. No one shall be held to give provocation to another by doing that which he had a legal right to do, or by doing anything which the offender incited him to do in order to provide the offender with an excuse for killing or doing bodily harm to any person.

4. An arrest shall not necessarily reduce the offence from murder to manslaughter because the arrest was illegal, but if the illegality was known to the offender it may be evidence of provocation.

The Royal Commissioners say, in reference to section 176 of their Draft Code, (which is the same as the above article 229), that it "introduces an alteration of considerable importance into the common law. By the existing law the infliction of a blow, or the sight by the husband of adultery committed with his wife may amount to provocation which would reduce murder to manslaughter. (7)

(1) See article 218, *ante*.
(2) 1 Hale 427, 428 ; 1 East P. C. c. 5. s. 13, p. 225.
(3) 1 Hale, 432 ; 1 Hawk P. C. c. 31 s. 5.
(4) 1 Hale 431.
(5) 4 Bl. Com. 35.
(6) See cases cited under Article 91, *ante*.
(7) See R. v. Kelly, 2 C. & K. 814, and other authorities cited, *ante*, p. 31.

It is possible that some other insufferable outrages might be held to have the same effect.

"There is no definite authoritative rule on the subject, but the authorities for saying that words can never amount to a provocation are weighty.

"We are of opinion that cases may be imagined where language would give a provocation greater than any ordinary blow. The question whether any particular act falls or not within this line appears to us to be pre-eminently a matter of degree for the consideration of the jury."

We have seen that, although under the common law mere words, as a general rule, were not a sufficient provocation, it has been held that, in certain exceptional cases, the words used might be such as to amount to a provocation sufficient to reduce what would otherwise be murder to manslaughter; as in the case of a husband astounded by the sudden and unexpected announcement from his wife that she had committed adultery. (1) By the law, however, as it now stands, under the above article 229 and the provisions of articles 45 and 46, there can be no longer any doubt that words will be a sufficient provocation if it is found by the jury, (whose province it is to decide), that they are of so insulting a character as to deprive the person provoked of the power of self-control.

As already shewn, (2) the question of whether a provocation will reduce the killing from murder to manslaughter will depend upon the nature and extent of the provocation, the nature extent and violence of the retaliation, and the weapon, if any, used; and also upon whether the killing has been done immediately upon the giving of the provocation, before there has been sufficient cooling time for passion to subside and for the party provoked to regain the power of self-control.

Circumstantial evidence.—In murder cases,—more so than in any other,—the evidence is, very often, circumstantial, the crime being usually committed in secret.

Circumstantial evidence, though always admissible, should be received and acted on, especially in murder cases, with the greatest caution: for it is well known that on many occasions persons have been convicted and executed for crimes, of which they have been afterwards found to have been innocent; and there are some instances of conviction and punishment for the murder of persons who afterwards turned out to be still alive, though they have been missing under circumstances of strong suspicion against the accused. Sir Mathew Hale gives two instances of this kind; and it was on this account that he laid down the rule, *never to convict any person of murder or manslaughter, till at least the body be found.* (3)

Although this rule has been and should be generally acted upon, it is not altogether inflexible; as, when the direct evidence brought before the jury is sufficiently strong to satisfy them that murder has really been committed. (4)

Common observation shows that certain circumstances give rise to certain presumptions; and it is upon the common observation of what is natural and of what is usually happening and being done in the ordinary affairs of life that the principal rules of evidence, and especially of presumptive evidence, are based. Certain acts are seen and known to lead to certain results; and the fact of the existence of certain circumstances leads to the conclusion that certain other circumstances, which generally accompany the former, also exist.

We thus take it for granted that, as a matter of nature, a mother has a strong affection for her child, that people in general are influenced by their interest, and that youth is susceptible of the passion of love. Therefore, the fact that A is the mother of B, leads to the presumption that A has a strong affection for B. And so it was that, of the two women who contended for their right to a

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(1) See Remarks of Mr. Justice Blackburn, in Rothwell's case, quoted at p. 31, *ante.*

(2) See pages 30, 31, and 32, *ante.*

(3) 2 Hale, 290. See particulars of one of these cases at p. 154 *post.*

(4) R. v. Hindmarsh, 2 Leach C. C. 569; Reg. v. Hopkins, 8 C. & P. 591.

child which each claimed as her offspring, that one was declared to be the mother who would not consent to its being cut in two and divided between them.

The principles of evidence being thus based upon the common observation of what is seen and believed to be passing around us, they depend to a considerable extent, upon the place where and the manners and habits of the times in which we live. For instance, when the King of Siam was told by a European ambassador that the rivers and seas of northern Europe were occasionally made so hard by the cold that people could walk on them, he positively refused to credit the truth of such a story, as being a description of something entirely repugnant to everything which he had ever seen or heard of

On a similar principle we readily give our belief to acts of common occurrence; but we are slow to give credence to those which are new and unlooked for.

Presumptions are of two kinds; one being the presumption or conclusion which the law attaches to certain kinds of guilt; as, where one kills another, the law draws the conclusion that he meant to kill. This is a presumption of law. The other kind of presumption is the presumption or conclusion of fact drawn by the judge, juror, or trier from the circumstances, as proved. For instance, how far the fact of a man being found, with a sword in his hand, by the prostrate body of a man just slain, leads to the conclusion that, the man thus found with the sword is the man who dealt the fatal blow, is a presumption for the jury to make.

No presumption can be made except upon some facts already known and ascertained. Thus if stains of blood on the coat of one tried for murder are to be presumed as evidence of guilt, the fact that the stains are actually stains of blood,—and not stains which may have been occasioned by something else than blood,—must be first distinctly ascertained.

Presumptions of fact are usually divided into three kinds or degrees, namely; *violent presumptions*, which are such as arise when the facts and circumstances proved *necessarily* attend the fact presumed; *probable presumptions* which are such as arise when the facts and circumstances proved *usually* attend the fact presumed: and *light or rash presumptions*, which in reality have no weight at all. (1) The facts in the case already alluded to, of the man found with a drawn sword, standing over the body of another man just killed, would be sufficient to give rise to that kind of presumption of his guilt, called a *violent* presumption.

If upon an indictment for stealing in a dwelling house, the stolen goods were found in the defendant's lodging some little time after being stolen, and if the defendant refused to account for his possession of them, this, with proof of the goods being actually stolen, would amount to a *probable* presumption that he stole them. If however the goods were not found recently after the loss, as for instance, not until sixteen months after, it would be but a light or rash presumption, entitled to no weight (2).

If a man, in a sober condition, and without means of getting drunk, go into the London Docks, and come afterwards, in a drunken state, out of one of the cellars wherein are a million gallons of wine, it would be reasonable evidence that he had stolen some of the wine in that cellar, though you could not prove that any wine was stolen or missed. (3).

In contending for the certainty of circumstantial evidence, it has been argued by some that circumstances cannot lie. This may perhaps, in general, be true; but witnesses can lie. And it is from the witnesses that the circumstances must be obtained. You are, therefore, liable to two forms of error, or, it may be deception; *first*, in the story told by the witnesses, in giving the circumstances; and, *secondly*, in the application to be made of the circumstances, when so obtained. Where the fact itself is one positively sworn to, as having been seen by

(1) Gilb. Ev. 147, 157; 3 Bl. Com. 372; Co. Litt. 6*b*.

(2) R. v. Adams, 3 C. & P. 600; R. v. Cooper, 3 C. & K. 318. Arch. Cr. Pl. & Ev. 21, Ed. 275.

(3) *Per Maule*, J. in R. v. Burton, Dears. 282; *See also* R. v. Mockford, 11 Cox, 16.

the witnesses, the conclusion to be drawn is generally obvious ; but where the actual fact forming the offence charged has not been seen, but has to be inferred or presumed from a train of circumstances, the drawing of the conclusion depends, for its correctness, not only upon whether the witnessses, who give the circumstances, have told the truth, and have forgotten nothing, and are free from mistake in every essential particular, but also upon whether the conclusion is reached by proper reasoning upon the circumstances as proved ; for as all men do not understand alike, very opposite conclusions may be drawn from the same circumstances and the same shades of probability.

Mascardus, an eminent writer on the general theory of proof, says : " Proof " by evidence of the thing is superior to every other ; and of all different kinds " none is so great as that which is made by witnesses deposing to what they " have seen " ; and in another place he says ; " Proof by presumption and " conjectures cannot be called a true and proper proof. "

Menochius, a writer whose work is entirely devoted to presumptions, or circumstantial evidence, says, at the very beginning of his work, that : " the " proof or credence which arises from the testimony of witnesses is superior to " any other."

One of the cases given by Lord Hale illustrates the fallacy of such a doctrine as that which asserts that circumstantial evidence is the best and most convincing kind of proof. The case is as follows : " An uncle who had the bringing up of his niece, to whom he was heir at law, had corrected her for some offence, and she was heard to say, " Good uncle, do not kill me ; " after which time she could not be found ; whereupon the uncle was committed upon suspicion of murder, and admonished, by the justices of the assize, to find out the child by the next assizes ; against which time he could not find her, but brought another child, as like her in years and person as he could find, and apparelled her like the true child ; but on examination she was found not to be the true child. Upon these presumptions, (which were considered to be as strong as facts that appear in the broad face of day), he was found guilty and executed ; but the truth was, the child, being beaten, ran away, and was received by a stranger ; and, afterwards, when she came of age to have her land, came and demanded it, and was directly proved to be the true child." (1)

Suspicion is to be distinguished from proof. In common language the term *suspicion* is the imagining of something wrong, without proof that it is wrong : and therefore it can never be a proper ground for conviction.

A suspicion is merely an impression upon a person's mind : but an inference is based upon and drawn from some fact.

" The wisdom and goodness of our law appears in nothing, more remarkably, than in the perspicuity, certainty, and clearness of the evidence it requires to fix a crime upon any man, whereby his life, his liberty, or his property can be concerned : herein we glory and pride ourselves, and are justly the envy of all our neighbor nations. Our law, in such cases, requires evidence so clear and convincing, that every bystander, the instant he hears it, must be fully satisfied of the truth and certainty of it. It admits of no surmises, innuendoes, forced consequences, or harsh constructions, nor anything else to be offered as evidence, but what is real and substantial, according to the rules of natural justice and equity. " (2)

Circumstantial evidence is in its very nature merely supplemental. It is only resorted to for the want of original and direct proof ; and, surely, it can never be said that what is secondary is equal to that which is original, or that the thing which is substituted is equal to that which it is meant to supply. As Lord Chief Baron Gilbert, in his work upon evidence, says :

" When the fact itself cannot be proved, that which comes nearest to the proof of the fact, is the proof of the circumstances that necessarily and usually attend such facts, and called presumptions ; and not proof, for they stand instead of the proofs of the fact, till the contrary be proved." (3)

(1) 2 Hale P. C. 290.
(2) Lord Cowper's speech on the Bishop of Rochester's case.
(3) 1 Gilb. Ev. 142.

Phillips, in his Work on Circumstantial Evidence says: "A regard to the peace and good order of society certainly requires that crimes shall be liable to be proved by circumstantial evidence. But a regard to the well being of society likewise demands that the mode of proof should be regulated by some fixed rules."

He then goes on to give the following as the chief of such rules:—

"1. *The actual commission of the crime itself (the corpus delicti) shall be clearly established.*

"2. *Each circumstance shall be distinctly proved.*

"3. *The circumstance relied on shall be such as is necessarily or usually incident to the fact charged.*

"4. *When the number of circumstances depends on the testimony of one witness, that number shall not increase the strength of the proof.* For, as the whole depends on the veracity of the witness, when that fails the whole fails.

"5. *Direct evidence shall not be held refuted from being opposed to circumstances incongruous with that evidence.* Because a certain degree of incongruity is incident to every man's conduct.

"6. *The judge, in summing up, shall assume no fact or circumstance as proved; but shall state the whole hypothetically and conditionally; leaving it entirely to the jury, to determine how far the case is made out to their satisfaction.*

"7. *The difficulty of proving the negative shall in all cases be allowed due weight.* But the silence of the prisoner as to facts, which, if innocent, he might have explained, shall be held an argument against him. This, of course, proceeds upon the supposition, that he stood fully apprized, before his trial, of all that was intended to be produced.

"8. *The counsel for the prisoner shall be allowed to object freely to the production of any evidence, as not proper to go to the jury, or as not being of legal credence.*

"9. *The jury shall be as fully convinced of the guilt of the prisoner, from the combination of the circumstances, as if direct proof had been brought.*

"10. *Where the body of the act is distinctly sworn to, a variation in the circumstances does not destroy the proof.*

"The following rule is the converse of the preceding one:

"11. *Where the leading fact or crime is only to be collected from circumstances, a material variation in these will defeat the effect of the whole.*

"12. *There being no repugnance in the chain of circumstances is a proof that a thing may be; not that it is: though, there being a repugnance is a proof that it cannot be* Whatever does not involve a contradiction, is possible; whatever involves one, is impossible.

"13. *The absence of the proof, naturally to be expected, is a strong argument against the existence of any fact alleged.* This applies particularly to cases where violence is charged."

It is very important to consider whether the circumstances proved necessarily involve the prisoner's guilt, or only probably so,—whether these circumstances might not all exist and yet the accused be innocent.

We sometimes hear a judge, in summing up, say, that the evidence is the best that the nature of the case can be supposed to afford; but this is, surely, no reason why the jury should be satisfied with it: for it is only by the evidence that the nature of the case can be known; and the case of an innocent man must always be of a nature to afford very little evidence.

In a criminal case, the impression on the mind of the jury,—in order to convict,—ought to be, not that the prisoner is *probably* guilty, but, that he *really* and *absolutely* is so:—where they doubt, it is their duty to acquit.

Indictments in murder and manslaughter cases.—In an indictment for murder no other count can be joined with the one charging the murder. This is provided by article 626, *post*, in its first paragraph; which says:—

"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.*"

Subsection 2 of article 633, *post*, provides that a previous conviction or acquittal shall be a bar to any second indictment for the same homicide whether the first indictment is for murder and the second for manslaughter or *vice versa*. The clause reads as follows:

"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."

It is also provided,—by article 713,—that if on a charge of murder the evidence is not sufficient to establish murder but only manslaughter a verdict of manslaughter may be found. The article is as follows:

"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."

By article 714, *post*, it is further provided that upon an indictment for child murder, the conviction may, if the jury finds that the evidence warrants it, be for concealment of birth instead of murder.

230. Manslaughter.—Culpable homicide, not amounting to murder, is manslaughter.

For article 231 see *ante* p. 149.

As article 236 prescribes the punishment for manslaughter, I have taken the liberty of changing its position, numerally, by placing it here, next to the foregoing definition of manslaughter.

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.

In order that culpable homicide shall not amount to murder but be only manslaughter, the following conditions are necessary:

1. The slayer must *not* have meant to cause death.
2. If in the doing of the act which has occasioned death, the offender's intention was to cause any bodily injury to any one, the bodily injury intended must *not* be such as the offender knew to be likely to cause death.
3. If the act by which the killing has been caused was an act done for an unlawful object, it must *not* have been such an act as the offender knew or ought to have known to be likely to cause death.

4. If in the doing of the act which has occasioned death the offender meant to inflict grievous bodily injury, it must *not* have been an act done to facilitate the commission of any of the offences mentioned in sub-section 2 of article 228, nor to facilitate flight upon the commission or attempted commission of any such offence.

5. If the act which has caused death is an act of administering some stupefying or overpowering thing, it must *not* have been done to facilitate the commission of any of the said offences mentioned in sub-section 2 of article 228, nor to facilitate flight upon the commission or attempted commission of any such offences; and.

6. If the act which has caused death is an act by which the offender has by any means stopped the breath of any person, it must *not* have been done to facilitate the commission of any of the said offences mentioned in sub-section 2 of article 228, nor to facilitate flight upon the commission or attempted commission of any of such offences.

As, by article 220, *ante*, homicide is made culpable in cases where the killing is either by an *unlawful act*, or by an *omission*, without lawful excuse, *to perform or observe a legal duty*, any such unlawful act or any such omission will be *murder* or *manslaughter* according as it *does* or *does not* come within the terms of articles 227 and 228.

For instance, if, by an unlawful act or by an omission to perform some legal duty, one causes the death of another, *meaning* to cause death, it will be murder If, however, in doing the unlawful act or in omitting to perform or observe the legal duty, one kills another, *not meaning* to kill any one, it will, in general, be manslaughter only. It may, however, even then,—notwithstanding the absence of intention to kill,—be murder, under some circumstances; as, where the offender's intention is to cause some bodily injury which he knows to be likely to cause death, and he is reckless whether death ensues or not. And, so, if a person, without intending to hurt any one, proceed, for some unlawful object,—say, with the object of robbing a bank,—to do an act, (such as the blowing open, by explosives, of a safe or vault), whereby the watchman, who happens to be in an adjoining office, is killed, the question would arise whether the act of blowing open the safe or vault was an act which the accused knew or ought to have known to be likely to cause death. If, under the circumstances of the case, as proved, the answer to this question were in the affirmative, the offender would be guilty of murder; if in the negative, he would be guilty of manslaughter only. Or, if, in order to facilitate resistance to lawful apprehension, or to facilitate the commission of robbery, or burglary, or rape, or forcible abduction, or any of the other offences mentioned in sub-section 2 of article 228, a person were to cause death, meaning to inflict some grievous bodily injury, or were to administer to another some stupefying drug or other overpowering thing, or were to stop the other's breath, by gagging, or by any other means, and if death were to ensue to the person so drugged, or so gagged, the offence would, in any of these cases, amount to murder, whether the offender meant death to ensue or not, and whether he knew or not that death was likely to ensue. But, if the bodily injury were inflicted or the drugging and stupefying or the gagging and stopping of breath were done to facilitate the commission of some offence other than any of those mentioned in sub-section 2 of article 228, and if the offender did not mean to cause death and did not know that death was likely to ensue, and, if, under the circumstances the act was not such or so done that he ought to have known it to be likely to cause death, he would be guilty of manslaughter only.

It will be seen, therefore, that, outside of those cases in which the plain test,—of killing, *meaning* to kill, or killing *not meaning* to kill,—can be applied, the dividing line between murder and manslaughter is uncertain and very much dependent upon and liable to be varied by circumstances.

ILLUSTRATIONS.

For instance, in each of the following illustrations, the act,—that of striking with a stick,—is the same; but the striker's guilt is varied, in degree, by the different circumstances.

1. A. strikes B. with a stick, and, *meaning* to cause his death, thereby kills him. A. is guilty of murder.

2. A., *not meaning* to cause death, strikes B., with a stick, and kills him. A. is guilty of manslaughter; unless, of course, there are circumstances of justification or excuse.

3. A. strikes and kills B., with a stick, meaning to cause B. some bodily injury, which he, A., knows to be likely to cause death, A. being reckless whether death ensues or not. A. is guilty of murder.

4. A. strikes B., with a stick, and thereby kills him, A's intention being to cause B. some bodily injury which is not known to A. to be likely to cause death. A. is guilty of manslaughter.

Persons in charge of dangerous things, animate or inanimate, and persons engaged in erecting or making anything which, in the absence of due precaution or care, may endanger human life are under a legal duty to guard against danger, (1) and are criminally responsible for the consequences of omitting their duty, without lawful excuse.

For instance, if a workman throw stones or other materials from a house in course of being erected or repaired, and thereby kill a person passing underneath, on the street, it is murder, manslaughter, or homicide by misadventure, according to whether there is an entire absence of care, or according to the degree of the precautions taken and of the necessity of any such precautions. If the workman threw the stones &c., without giving any previous warning to persons passing beneath, and at a time when it was likely for persons to be passing, it would be murder; (2) if it were done at a time when it was not likely that any persons would be passing, it would be manslaughter: (3) and if done in a retired place, where no persons are in the habit of passing or likely to pass, it would be misadventure merely. (4) Or, if the workman previously gave warning to persons beneath,—then, if it happened in a country village, where few persons pass, it would in that case also be misadventure only; (5) but if it were in some large and populous city or town and at a time when the streets were full, it would be manslaughter, even if he gave previous warning. (6)

If a man breaking an unruly or vicious horse, ride him into a crowd of people, and the horse kick and kill one of the persons in the crowd, this would be murder, if the rider, in bringing the horse into the crowd, meant to do mischief, or even if he meant to divert himself by frightening the crowd; (7) for by reason of his intention to do mischief, or to frighten people he would be doing an unlawful act, which he knew or ought to have known to be likely to cause some one's death. If his riding into the crowd were done, not intentionally, but carelessly and incautiously only, he would be guilty of manslaughter (8).

If a man driving a cart or other vehicle drive it over another man and kill him, it would be murder, if he saw or had timely notice of the probable mischief, and yet drove on. (9)

Upon an indictment for manslaughter it appeared that the deceased was walking in the road, and was in a drunken condition, when the prisoner, who was in a cart and driving two horses, without reins, and going at a furious pace, ran over him and killed him. It appeared that the prisoner had called out twice to the deceased, who, from, his drunken condition, and the pace of the horses, could not get out of the road. This was held to be manslaughter. (10)

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(1) See article 213, *ante*, p. 136.
(2) 3 Inst. 57.
(3) Fost, 262.
(4) 1 Hale 472, 475.
(5) 1 Hale 475.
(6) Kel. 40; Fost. 263; Arch. Cr. Pl. & Ev. 21 Ed. 730.
(7) 1 Hawk. c. 31, s 68.
(8) 1 East. P. C. 231
(9) 1 Hale, 475; Fost. 263;
(10) R. v. Walker, 1 C. & P. 320.

In another case the prisoner drove the deceased (a friend of his) in a trap to the races. At the races the prisoner became intoxicated: and the deceased, who noticed this, before commencing the homeward journey, proposed to drive; but the prisoner declined, and insisted upon doing the driving himself. They then started off, the prisoner standing up and flogging the horse, and driving at a furious rate, until finally the trap was upset, and the deceased was thrown out and killed. *Lush*, J. directed the jury to find the prisoner guilty of manslaughter, if they thought the carriage was overturned by the prisoner's culpably negligent driving and that that caused the death of the deceased (1).

If a man have a beast, which he knows to be accustomed to do mischief, and he, through want of due care, allows it to go abroad, and it kills some one, this is manslaughter in the owner who thus allows it to get abroad. If he turned it loose purposely, though merely to frighten people, and to make what is called sport, it would then be as much murder as if he incited a bear or a vicious dog to worry people. (2)

A., B. and C. went into a field in proximity to certain roads and houses, taking with them a rifle, which would be deadly at a mile. They all three practised firing, with the rifle, at a target, which they erected in the field, at a distance of about one hundred yards; and they took no precautions of any kind to prevent danger from the firing. One of the shots killed a boy in a tree in a garden, at a spot 393 yards distant from the firing-point. It was held that, although there was no proof as to which of the three fired the fatal shot, A. B. and C were all guilty of a breach of duty in firing at the place in question, without taking proper precautions to prevent injury to others, and they were found guilty of manslaughter. (3)

A cannon, which had burst and had been returned to an iron founder, was sent back by him in so imperfect a state that on being fired it burst again and killed a person; and it was held to be manslaughter. (4)

A. having the right to the possession of a gun which was in the hands of B. and which he, A., knew to be loaded, attempted to take it by force. In the struggle which ensued, the gun accidentally went off and caused the death of B. A. was held guilty of manslaughter, inasmuch as the discharge of the gun was the result of his unlawful act in attempting to retake the gun *by force*. (5)

This last case approaches very closely to the idea of murder, as defined in article 227 (*d*), which makes it murder if the offender, *for any unlawful object*, does an act which he knows or ought to have known to be likely to cause death, and thereby kills any person. A distinction, however, may be drawn from the fact that in the above case the object of the accused,—that of obtaining possession of the gun which was his own property,—was not an unlawful object, although the means used, attempting to regain possession of it by force, were unlawful; and, besides, in order to bring the case within the terms of article 227 (*d*), the circumstances established in evidence would have to be such as to shew that the accused was doing an act which he knew or ought to have known was likely to cause death.

Contributory negligence of deceased no defence.—If the drivers of two carriages race with each other and urge their horses to so rapid a pace that they cannot control them, it is manslaughter in both drivers, if, in consequence, one of the carriages upsets and a passenger is killed (6)

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(1) R. v. Jones, 11 Cox, 544; Arch. Cr. Pl. and Ev. 21 Ed. 731.
(2) 1 Hale, 431; 4 Bl. Com. 197.
(3) R. v. Salmon, 6 Q. B. D. 79; 50 L. J. (M. C.) 25.
(4) R. v. Carr, 8 C. & P., 163.
(5) R. v. Archer, 1 F. & F., 351.
(6) R. v. Timmins, 7 C. & P. 499; R. v. Swindall, 2 C. & K. 230.

In Swindall's case it was held to be no defence to shew that the death of the deceased was due in part to the contributory negligence of the deceased. In summing up *Pollock*, C. B. said, "It matters not whether he [the deceased] was deaf, or drunk, or negligent, or in part contributed to his own death; for in this consists a great distinction between civil and criminal proceedings. If two coaches run against each other, and the drivers of both are to blame, neither of them has any remedy for damages against the other. But, in the case of loss of life, the law takes a totally different view; for, there, each party is responsible for any blame that may ensue, however large the share may be; and so highly does the law value human life that it admits of no justification wherever life has been lost, and the carelessness or negligence of any one person has contributed to the death of another person."

The same rule, that contributory negligence on the part of the deceased is no defence to an indictment for manslaughter, was laid down by Byles, J., in Hutchison's case, (1) and in Kew's case; (2) by *Lush*, J., in Jones' case, already cited *supra*, and by *Mellor*, J., in Dant's case (3). In the latter case, the prisoner, having a right of common, had turned out upon a common, across which there were public footpaths, a horse which he knew to be vicious, and the horse had kicked and killed a child. The prisoner was held liable to be convicted of manslaughter, even though the child had strayed on to the common a little off the path.

Immoderate correction.—Where a parent is moderately correcting his child, a teacher his scholar, or a master his servant, and death happens to ensue, it is only misadventure: but, if the bounds of moderation be exceeded, either in the manner, the instrument, or the quantity of punishment, and death ensue, it is either manslaughter or murder, according to the circumstances. (4) And so, where, in a case already referred to, *supra*, (5) a master corrected his servant by striking him, with an iron bar, and where, in another case, a schoolmaster stamped on his scholar's belly, so that in each case the sufferer died, these were both held to be murders; because the correction, being excessive and such as must have proceeded from a bad heart, it was equivalent to a deliberate act of killing. (6) And in all cases where the correction is inflicted with a deadly weapon, and the party dies of it, it will be murder: if with an instrument which is not likely to kill, though not proper for the purpose of correction, it will, then, be manslaughter. (7)

Where a master struck his servant with one of his clogs because he had not cleaned them, and death unfortunately ensued, it was held to be manslanghter only, because the clog, although an improper instrument to use for the purpose of correction, was very unlikely to cause death, and therefore the master could have had no intention of taking life when he used it. (8)

When a mother, being angry with one of her children, took up a poker, and, as the child ran to the door which was open, threw it after him, and struck and killed another child who happened at the time to be coming in at the open doorway, it was held that, although she did not intend to hit the child at whom she threw the poker, but merely meant to frighten him, it was manslaughter. (9)

In another case, where the father of a child, two and a half years old, chastised it, for some childish fault, by beating it with a strap on the lower part of

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(1) R. v. Hutchison, 9 Cox, 555.
(2) R. v. Kew, 12 Cox, 355.
(3) R. v. Dant, L. & C. 567; 34 L. J. (M.-C.) 119; Arch. Cr. Pl. & Ev. 21 Ed. 732.
(4) 1 Hale, 473, 474.
(5) Rex. v. Grey, Kel 64.
(6) Fost. 262.
(7) Fost. 262; R. v. Hopley, 2 F. & F. 201.
(8) R. v. Turner, Comb. 407, 408; *see also*, R. v. Wigg, 1 Leach, 378*n*; R. v. Leggett, 8 C. & P. 191; Arch Cr. Pl. & Ev. 21 Ed. 727, 728.
(9) R. v. Conner, 7 C. & P. 438.

its back and on its thighs, and the death of the child was thereby accelerated, he was held guilty of manslaughter. For the defence it was contended that, as the father had a right to correct his child, there was no case to go to the jury; but *Martin*, B., after consulting with *Willes*, J., ruled that the law of correction had no reference to an infant of two and a half years old, but only to those capable of appreciating correction, and that, although a slight slap might be lawfully given to an infant by its mother, more violent treatment, of an infant, so young, by her father, would not be justifiable. (1)

232. Attempts to murder.—Every one is guilty of an indictable offence and liable to imprisonment for life, who does any of the following things with intent to commit murder; that is to say—

(*a.*) administers any poison or other destructive thing to any person, or causes any such poison or destructive thing to be so administered or taken, or attempts to administer it, or attempts to cause it to be so administered or taken; or

(*b.*) by any means whatever wounds or causes any grievous bodily harm to any person; or

(*c.*) shoots at any person, or, by drawing a trigger or in any other manner, attempts to discharge at any person any kind of loaded arms; or

(*d.*) attempts to drown, suffocate, or strangle any person; or

(*e.*) destroys or damages any building by the explosion of any explosive substance; or

(*f.*) sets fire to any ship or vessel or any part thereof, or any part of the tackle, apparel or furniture thereof, or to any goods or chattels being therein; or

(*g.*) casts away or destroys any vessel; or

(*h*) by any other means attempts to commit murder. R.S.C., c. 162, s. 12.

Article 713, *post*, provides that when the commission of an offence charged in an indictment includes the commission of any other offence, the accused may, if the whole offence charged be not proved, be convicted of any other offence so included therein, if proved. Therefore, if upon the trial of an indictment for wounding or causing grievous bodily harm with intent to murder, the intent to murder be not proved, the jury may, according to the evidence, find the accused guilty of unlawfully wounding or of unlawfully inflicting grievous bodily harm or of a common assault, each of these offences being included in the higher offence of wounding with intent to murder.

Article 712, *post*, provides that, when, upon a charge of attempt, the evidence establishes the commission of the full offence, the accused may either be convicted of the attempt, (for an attempt to commit a crime must necessarily precede and be included in the actual perpetration of a crime), or the court may, instead of taking any verdict on the attempt, direct the accused to be indicted for the complete offence; but after being convicted of the attempt the accused cannot be tried for the offence which he was charged with attempting to commit.

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(1) R. v. Griffin, 11 Cox, 402.

It is also provided,—by article 711, *post*,—that when the complete commission of the offence charged is not proved, but only an attempt to commit the offence the accused may be convicted of the attempt.

Administering poison.—Where a female servant, put arsenic into coffee which she prepared for breakfast, and afterwards told her mistress that she had prepared the coffee for her, whereupon the mistress drank the coffee, it was held by *Park*, J., that this was an administering. (1)

Where A., knowingly, gave poison to B. to administer as a medicine to C., but, B., neglecting to do so, it was accidentally given to C., by a child, this was held to be an administering by A., just as much as if she had given it to C., with her own hands. (2)

A., having mixed corrosive sublimate with sugar, put it in a parcel, directing it to *Mrs. Daws*, at Townhope, and left it on the counter of B. a tradesman, who sent it to *Mrs. Davis*, who used some of the poisoned sugar. *Gurney*, B., held this to be an administering; for, although the parcel was intended for Mrs. Daws, yet, as it found its way to Mrs. Davis, it was the same in its effect, as if it had been intended for Mrs. Davis. (3) In another case, however, *Parke*, B., after consulting with *Alderson*, B., expressed the opinion that an indictment for causing poison to be taken by A., with intent to murder A., could not be sustained by evidence shewing that the poison, though taken by A., was intended for another person, and he doubted the propriety of the decision of *Gurney*, B., in the above case of R. v. Lewis. He accordingly directed a fresh indictment to be preferred charging the intent to be generally "*to commit murder*"; upon which the defendant was again tried, convicted, and sentenced. (4) But see R. v. Smith, *post*. p. 164, *note 4*.

A., administered to B. a child, two coculus indicus berries entire in the pod, with intent to murder. The kernel of this berry is poison, but the pod is not, and will not dissolve in the stomach. The two berries thus administered were, therefore, as it happened, quite harmless. It was, nevertheless, held that there was an administering of poison with intent to murder. (5)

Evidence of administering at different times may be given to shew the intent. (6)

Wounding or causing grievous bodily harm with intent to murder.—It will be seen that the above article 232 (*b*) is aimed against wounding or causing grievous bodily harm *by any means*; and therefore upon the trial of an indictment for wounding with intent to murder, the instrument or means by which the wound was inflicted need not be stated. (7)

To constitute a wound the continuity of the skin must be broken; (8) in other words, the outer covering of the body, (that is, the whole skin, not the mere *cuticle*, or upper skin, (9) must be divided (10). A division of the internal skin,—for instance, within the cheek or lip,—is sufficient to constitute a wound. (11)

The word "wound" includes incised wounds, punctured wounds, lacerated wounds, contused wounds, and gunshot wounds; (12) and, in short, any and

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(1) R. v. Harley, 4 C. & P. 369.
(2) R. v. Michael, 2 Moo C. C., 120; 9 C. & P. 356.
(3) R. v. Lewis, 6 C. & P. 161.
(4) R. v. Ryan, 2 M. & R. 213.
(5) R. v. Cluderoy, 1 Den. 514; 2 C. & K. 907; 19 L. J. (M. C.), 119.
(6) R. v. Mogg, 4 C. & P., 364.
(7) R. v. Briggs, 1 Moo. C. C. 318.
(8) R. v. Wood, 1 Moo. C C. 278.
(9) R. v. McLoughlin, 8 C. & P., 635.
(10) R. v. Becket, 1 M. & Rob., 526.
(11) R. v. Smith, 8 C. & P. 173; R. v. Warman, 1 Den. 183; 2 C. & K. 195.
(12) Shea v. R., 3 Cox, 141.

every kind of wound, no matter how or by what produced. If the skin be broken, the nature of the instrument by which it was effected is immaterial. It makes no difference whether it was done with a kick from a shoe, (1) or with a hammer thrown at and striking a person on the nose, and thus breaking the skin, (2) or by striking a man's hat violently with an air-gun and thereby causing the hat to wound the man. (3)

The following remarks, on the meaning of the word "wound," are taken from Woodman & Tidys' Forensic Medecine:

"RICHARD WISEMAN, who lived in the reigns of Kings Charles I. and Charles II., and was Serjeant-Surgeon to the latter, defines a *Wound* as '*a solution of continuity in any part of the body suddenly made by anything that cuts or tears, with a division of the skin.*' He goes on to say that by *skin* he understands 'not only the *external cutis*, but also the inward membranes of the gullet, ventricle, guts, bladder, urethra, and womb, all of which are capable of wounds from sharp instruments, either swallowed or thrust into them.' (4)

"In other words, the solution of continuity may affect either the skin and subjacent parts or mucous membranes, and the parts lined by them. But this definition excludes so many mechanical injuries, that it has been proposed to use the word *lesion* for the general term. Beck states that 'the term *wound* in *legal medecine* comprehends all *lesions* of the body, and in this it differs from the meaning of the word when used in surgery. The latter only refers to a solution of continuity, while the former comprises not only these, but also every other kind of accident, such as bruises, contusions, fractures, dislocations,' &c.

"Lord Lyndhurst, Chief Baron, said—'The definition of a *wound* in criminal cases, is an injury to the person, by which the skin is broken. If the skin is broken, and there was a bleeding, that is a wound.' (5)

"On this, Beck properly remarks, that a man may have a bone fractured from a blow, without any breaking of the skin (6)

"Dr. Taylor remarks, that Wiseman's definition would include ruptures of internal organs, such as the liver and spleen, and burns and scalds, as well as simple fractures and dislocations. On applying to three eminent surgeons, he obtained the three following definitions:—

'A wound is—
1. A solution of continuity, from violence, of any naturally continuous parts.
2. An external breach of continuity directly occasioned by violence.
3. An injury to the organic textures by mechanical or other violence.'

"The want of a legal definition formerly allowed the collar bone to be broken by a hammer or otherwise, provided the skin were not broken, and similar injuries to be inflicted, and yet the prisoner to escape, because this was not considered a wound. (7)

"Now, however, these lesions would be included in the second clause of the sentence, 'shall by any means whatever wound, or *cause any grievous bodily harm to any person*, and by any means other than those specified,' etc., etc., 'with or without any weapon or instrument.' [*See* the Acts 1 Vict., c. 85; 14 and 15 Vict., c. 100; and §§ 11, 15, and 20 of 24 and 25 Vict., c. 100]. Some medical witnesses have held that there is no wound unless the skin be completely divided (as in the case tried in 1838, at the Central Criminal Court, in which a man struck the prosecutor a severe blow on the temple with a heavy stone bottle, which was broken by the blow, but failed to divide the skin com-

(1) R. v. Briggs, 1 Moo. C. C. 318.
(2) R. v. Withers, 1 Moo. C. C. 284; R. v. Payne, 4 C. & P. 558.
(3) R. v. Sheard, 2 Moo. C. C. 13; 7 C. & P. 846.
(4) Wiseman, "Chirurg. Treat." Book 5, chap. 1.
(5) Lord Lyndhurst's Rem. in Moriarty v. Brooks, 6 C. & P. 684.
(6) Beck Med. Jur. 600.
(7) Reg. v. Wood, Mathew's Dig. 415; 4 C. & P. 381.

pletely). The skin is said to be about ¼ to 1½ line in thickness, or from $\frac{1}{16}$ to ¼ of an inch. [Quain and Sharpey, Kölliker, &c.] Mr. Justice Talfourd held it absurd to suppose that so thin a thing as the skin could be broken internally without external wound. Analogy was against him, in the case of the inner coat of arteries, etc. Yet it is not our wish to insist upon undue refinements. It would be far better to accept the continental definition, that 'a wound includes any personal injury, suddenly arising from any kind of violence applied externally, whether such injury is external or internal.' On the other hand, all surgeons are agreed that a division of the true skin is a wound, whether it bleeds or does not bleed. Wiseman's definition prudently includes the mucous membranes, for very serious injuries may be, and have been inflicted on the interior of the body, as in the rectum and vagina, in the throat, mouth, and nostrils, etc. But simple fractures and the like, and the rupture of internal organs, are still in a doubtful category as to being wounds or not. Yet Lord Denman's decision in the Queen's Bench, in November, 1847, includes them by implication. For in this case an application was made to the Court for a new trial, on the ground of misdirection on the part of the Chief Baron. An action was brought against a medical practitioner for negligence in the treatment of a *simple dislocation* of the arm. The words of the declaration were, that the plaintiff had employed the defendant, who was a surgeon, 'for the treatment and cure of certain *wounds*, fractures, bruises, complaints, and disorders.' In the application it was submitted that none of these words applied to the injury in question. Lord Denman, however, refused the rule, saying, 'It is rather strange that the pleader should have omitted the most appropriate word; but we think the Chief Baron was quite right.' Webster defines a *wound* as 'a hurt given to the body or animal-frame by violence: an injury; a cut; a slash; laceration.' So Milton of the Fall:—

> 'Earth felt the *wound*, and Nature from her seat
> Sighing through all her works, gave signs of woe,
> That all was lost.'

"We believe it would not be difficult to multiply quotations from the poets to show that the word *wound* is generally used in the sense of a lesion or injury. And although in simple fractures, the judges formerly held that these were not wounds [as in *Rex* v. *Wood*, quoted above]; yet several recent decisions of the judges (Chief Justice Denman, Justice Parke, &c.,) (1) have overruled this, and held fractures of the lower jaw, skull &c., without bloodshed, to be wounds. 'There must be a wounding; but if there be a wound (whether there be effusion of blood or not), it is within the statute, whether the wound is *internal* or *external*.' —Justice Parke.

"So that, as Dr, Taylor remarks, it may be reasonably supposed that ruptures of internal organs, as well as simple fractures and dislocations, will be considered as wounds." (2)

It is not necessary that the wound should be in a vital part; for the real question is not what is the wound actually given, but what wound was intended to be given. (3)

Shooting with intent to murder.—Where a defendant was charged with wounding T., with intent to murder him, and the evidence shewed that the defendant's intention was to murder M., and that he shot at and wounded T., supposing him to be M., and the jury found that he intended to murder the man at whom he shot, supposing that he was M., the court held the conviction right. (4)

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(1) See Reg. v. Smith, 8 C. & P. 173; R. v. Warman, 1 Den. 183; 2 C. & K. 195.
(2) Woodman & Tidy, For. Med. 1044, 1045.
(3) R. v. Hunt, 1 Moo, C. C. 93; R. v. Griffith, 1 C. & P. 298.
(4) R. v. Smith, Dears, 559; 25 L. J. (M. C.) 29; Arch. Cr. Pl. & Ev. 21 Ed. 750; *See also* P. *v.* Torres, 38 Cal. 141; *and* Callahan *v.* S. 21 Ohio St. 306; 2 Bish New Cr. L. Com. s. 741.

A person, who fired a loaded pistol into a group of people, not aiming at any particular one, and who hit one of such group, was held guilty of shooting at the person he hit, with intent to do grievous bodily harm to that person. (1)

If A. draw a loaded pistol from his pocket for the purpose of murdering S., but, before he can do anything further in pursuance of his purpose, some one snatches the pistol from his hand, it seems that he would be guilty of an attempt; (2) and at all events, if he put his finger on the trigger, and tried to pull it, and was only prevented from doing so by forcible interference of bystanders he would be guilty of the offence. (3)

Under article 3 (*o*) the expression "*loaded arms*" means and includes "any gun, pistol or other arm loaded with gun powder, or other explosive substance, and ball, shot, slug or other destructive material, or charged with compressed air and ball, shot, slug or other destructive material."

For the definition of an *attempt*, *see* article 64, and full comments thereon, *ante* p. p. 40-41.

Subsection (h) of article 232, which is a provision similar to section 15, 24-25 Vict., c. 100, embracing as it does all attempts, *by any other means*, to commit murder, will include all those cases where machinery used in lowering miners into mines is injured with intent that it shall break and precipitate the miners, who may be passing up or down, to the bottom of the pit: and also all cases where steam engines are injured for the purpose of killing any one, as well as the cases of sending or placing infernal machines with intent to murder. (4)

223. Threats to murder.—Every one is guilty of an indictable offence and liable to ten years' imprisonment who sends, delivers or utters, or directly or indirectly causes to be received, knowing the contents thereof, any letter or *writing* threatening to kill or murder any person. R.S.C., c. 173, s. 7.

Under article 3 (*ee*) "*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."

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 Her Majesty or not, or is within Her Majesty's dominions or not; or

(*b.*) counsels or attempts to procure any person to murder such other person anywhere, although such person is not murdered in consequence of such counselling or attempted procurement. R.S.C., c. 162, s. 3.

This article is the same in effect as the Imperial statute, 24 and 25 Vict. c. 100, s. 4, under which it was held in Most's case that the publication and circulation of a newspaper article may be an encouragement or attempt to persuade to murder, although not addressed to any person in particular. The prisoner had published and circulated an article written in German, in a newspaper published

(1) R. v. Fretwell, L. & C. 443; 33 L. J. (M. C.) 128.
(2) R. v. Brown, 10 Q. B. D. 381; 52 L. J. (M. C.) 49.
(3) R. v. Duckworth, [1892] 2 Q. B. 83.
(4) R. v. Mountford, R. & M. C. C. 441; 7 C. & P. 242; Arch. Cr. Pl. & Ev. 21 Ed. 753.

in that language in London, exulting in the recent assassination or the Czar of Russia, and commending the murder as an example to all revolutionists throughout the world; and at the trial the jury were directed that if they thought that by the publication of the article the prisoner intended to encourage and did encourage or endeavor to persuade any person to murder any other person, whether a subject of Her Majesty or not, and whether within the Queen's dominions or not, and that such encouragement and endeavoring to persuade was the natural and reasonable effect of the article, they should find him guilty. This direction was held correct. (1)

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.

For article 236, see *ante* p. 156.

237. Aiding and abetting suicide.—Every one is guilty of an indictable offence and liable to imprisonment for life who counsels or procures any person to commit suicide, actually committed in consequence of such counselling or procurement, or who aids or abets any person in the commission of suicide.

In reference to this subject the English Commissioners have the following remark :—

"By the present law suicide is murder; and a person who assists another to commit suicide is an accessory before the fact to murder and liable to capital punishment. It appears to us that the abetment of suicide and attempts to commit suicide ought to be made specific offences. We provide for this in sections 183 and 184." (Identical with our articles 237 and 238.)

238. Attempt to commit suicide.—Every one who attempts to commit suicide is guilty of an indictable offence and liable te two years' imprisonment.

Opposite to the section of the English Draft Code corresponding with this article the Royal Commissioners have the following note :—

"This is the existing law. *See* Reg., *v.* Burgess, L. & C. 258."

239. Neglecting to obtain assistance in childbirth.—Every woman is guilty of an indictable offence who, with either of the intents hereinafter mentioned, being with child and being about to be delivered, neglects to provide reasonable assistance in her delivery, if the child is permanently injured thereby, or dies, either just before, or during, or shortly after birth, unless she proves that such death or permanent injury was not caused by such neglect, or by any wrongful act to which she was a party, and is liable to the following punishment:

(*a.*) If the intent of such neglect be that the child shall not live, to imprisonment for life;

(*b.*) If the intent of such neglect be to conceal the fact of her having had a child, to imprisonment for seven years.

Opposite to sections 185 and 186 af the English Draft Code, which correspond with this article, the Royal Commissioners have the following note :—

(1) R. v. Most, 7 Q. B. D. 244; 50 L. J. (M. C.) 113.

"These are new. Women found guilty of concealment of birth, under the existing law, (1) have in most cases been really guilty of the acts made substantial offences by these sections. (Article 239.) These sections, (article 239,) would also often afford a means for punishing child murder, where there would be a practical difficulty in obtaining a conviction for that offence."

In their report the Royal Commissioners say further :—

"The subject of child murder is one as to which the existing law seems to require alteration. At present, no distinction is made between the murder of a new-born infant, by its mother, and the murder of an adult.

"Practically this severity defeats itself, and offences, which are really cases of child-murder, are often treated as cases of concealment of birth simply. The Bill proposed to meet this by an enactment which, (as amended by the Attorney General), would have enabled a jury to convict of manslaughter, instead of murder, a woman who caused her new-born child's death by an act done when her power of self-control was greatly weakened. On the whole, we have preferred to substitute for it the provisions contained in sections 185 and 186." (Article 239.)

240. Concealing dead body of child.—Every one is guilty of an indictable offence, and liable to two years' imprisonment, who *disposes* of the dead body of any child *in any manner*, with intent *to conceal* the fact that its mother was delivered of it, whether the child died before, or during, or after birth. R.S.C., c. 162, s. 49.

On a trial for child murder, the jury, if they acquit on the charge of murder, may, under article 714, *post*,—if the evidence warrants it,—convict the accused of concealment of birth.

It was held, in one case that a fœtus not bigger than a man's finger, but having the shape of a child, was a child within the meaning of the English statute against concealment of birth. (2)

Where a woman was delivered of a child whose dead body was found in a bed amongst the feathers, but there was no evidence to shew who put it there, and it appeared that the mother had sent for a surgeon when she was confined, and had prepared clothes for the child, the judge directed an acquittal on the charge of endeavoring to conceal the birth. (3)

In another case the mother caused the body of her child to be secretly buried with a view to conceal its birth, and although she had previously allowed the birth to be known to some persons, it was held that she might be convicted of the concealment. (4)

The mere denial of the birth is not sufficient to convict. There must be proof of some act of disposal of the body after the child's death. (5)

It was held by a majority of the judges, that the putting of the child's dead body between a bed and the mattress, or under a bolster, on which the accused lay her head, was a sufficient disposal of it to constitute the offence. (6)

In order to convict a woman of attempting to conceal the birth of her child it has been held that a dead body must be found and identified as that of the child of which she was delivered. (7)

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(1) Meaning the law as now contained in Article 240.
(2) R. v. Colmer, 9 Cox 506.
(3) R. v. Higley, 4 C. & P. 566.
(4) R. v. Douglas, 1 Moo. C. C. 480.
(5) R. v. Turner, 8 C. & P. 755.
(6) R. v. Goldthorpe, 2 Moo. C. C. 244; C. & Mar. 335; R. v. Perry, Dears 471; 24 L. J. (M. C.) 137.
(7) R. v. Williams, 11 Cox, 684; Arch. Cr. Pl. & Ev. 21 Ed. 828, 829.

A. placed the dead body of a child of which she had been delivered between a trunk and the wall of a room in which she lived alone. Being charged with having had a child she at first denied it, but being pressed she pointed out where the body was. Held, that she might be convicted of concealing the birth of the child. (1)

PART XIX.

BODILY INJURIES, AND ACTS AND OMISSIONS CAUSING DANGER TO THE PERSON.

241. Wounding with intent.—Every one is guilty of an indictable offence and liable to imprisonment for life who, with intent to maim, disfigure or disable any person, or to do some other grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, unlawfully by any means *wounds* or *causes any grievous bodily harm* to any person, or *shoots* at any person, or, by drawing a trigger, or in any other manner, *attempts to discharge* any kind of *loaded arms* at any person. R.S.C., c. 162, s. 13.

It will be sufficient to warrant a conviction under this article if it be proved that the defendant *wounded*, or *caused grievous bodily harm to*, or *shot at*, etc., *any* person with intent to maim, disfigure, or disable *any person*, etc., so that if A. struck at B. but, C. interposing, received the blow, and was wounded, A. could be convicted of wounding C. with intent to do him grievous bodily harm.

We have already noticed, under article 232, *ante*, the meaning of the word "*wounds*," and that wounds may be *incised, punctured, contused* or *lacerated* wounds.

An *incised* wound is commonly called a "cut," and is generally produced by a weapon with a sharp edge, as a knife, a sword, a scythe, scissors, etc.; but some clean sharp cuts and ugly gaping wounds have been known to be produced with a square poker, or even with the fist or a blunt body, when it strikes a sharp bony ridge, such as that of the eyebrow, the cheek bone, etc.

Punctured wounds are caused by the penetration of some pointed weapon, or anything with a sharp point, such as a dagger, a pen-knife, a poniard, a piece of broken glass, a tobacco pipe, scissor points, arrows, darts, sharp stones, etc. These wounds are sometimes dangerous and troublesome, from the fact that the external wound may heal over too soon, and keep the *pus* confined, or injury may be done to nerves and blood vessels in the deeper parts of the wound. An instance, given by medical writers, of the dangerous nature of a punctured wound, is that of a clockmaker who, while picking his ear with the wire stem of a clock pendulum, was struck on the elbow by a drunken man who thus caused the wire to pass through his ear into the brain, and occasioned his death

A *contused* wound is one in which there is considerable bruising, with discoloration of the surrounding skin, caused by effusion of blood, from small ruptured vessels into the surrounding cellular membrane, or sub-cutaneous tissue. The change of color is produced by the oxidation of the effused blood;

(1) R. v. Piché, 30 U. C. C. P. 409; Bur. Dig. Cr. L. 228.

and when it takes place near the eye, it is popularly called a "black eye." After from eighteen to twenty-four hours from the commencement of the discoloration the black or dark-blue coloring begins to grow lighter, and changes gradually, from day to day, passing through different shades of green, yellow, lemon, etc., until it completely disappears. When the blood is effused in quantity, as for example by the blow of a cricket-ball, such a swelling is called *hæmatoma*, or blood tumor. The shape of a bruise may sometimes be an important item of evidence. Starkie states that on one occasion, in a case of attempt to murder, the prosecutor had, in his own defence, struck his assailant with a house door-key, and the *marks of contusion produced by the wards of this key* became the chief means of the would-be murderer's identification and conviction.

In some cases of contused wounds it may take two or three days for the skin to appear discolored or bruised; and the time taken for the completion of these changes of color, as well as for the absorption of the blood, may vary from a few days to some weeks.

Lacerated wounds are torn and ragged ones, such as are produced by sawing movements of blunt or jagged instruments, as for example, stones, glass, earthenware, shots from fire-arms, etc. These wounds are generally dangerous, from often containing dirt and foreign bodies, such as fragments of wadding, powder, etc., and because they can only heal by granulation and suppuration, and not by primary union or adhesion.

Some wounds are of a mixed character. When a wound is produced with a knife, for instance, one part may be cleanly cut or incised, and another may be hacked or lacerated, and a different force or direction being given to the point of the knife may cause the wound to be at one end a punctured or pointed one. (1)

242. Wounding.—Every one is guilty of an indictable offence and liable to three years' imprisonment who unlawfully *wounds* or *inflicts* any *grievous bodily harm* upon any other person, either with or without any weapon or instrument. R.S.C., c. 162, s. 14.

See comments under previous article and under article 232, *ante*.

243. Shooting at Her Majesty's vessels, and wounding public officers, on duty.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who wilfully—

(*a*.) shoots at any vessel belonging to Her Majesty or in the service of Canada; or

(*b*) maims or wounds any public officer engaged in the execution of his duty or any person acting in aid of such officer. R.S.C., c. 32, s. 213; c. 34, s. 99.

"Public officer" is defined by article 3 (*w*) as "Any Inland Revenue or customs officer, officer of the army, navy, marine, militia, North-west mounted police, or other officer engaged in enforcing the laws relating to the revenue, customs, trade or navigation of Canada."

244. Disabling or drugging with intent to commit an indictable offence.—Every one is guilty of an indictable offence and liable to imprisonment for life and to be whipped, who with intent thereby

(1) Woodman & T. For. Med. 1047, 1048.

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 comments under article 232, *ante*, p. 161.

245. Administering poison.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who unlawfully administers to, or causes to be administered to or taken by any other person, any poison or other *destructive* or *noxious* thing, so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm. R.S.C., c. 162, s. 17.

246. Every one is guilty of an indictable offence and liable to three years' imprisonment who unlawfully administers to, or causes to be administered to or taken by, any other person, any poison or other *destructive* or *noxious* thing, with intent to injure, aggrieve or annoy such person. R.S.C., c. 162, s. 18.

See comments under article 232, *ante*.

If the poison or destructive or noxious thing is administered merely with intent to *injure aggrieve* or *annoy*, which in itself would be punishable under article 246, yet if it does in fact endanger the life of or inflict grievous bodily harm upon the person to whom it is administered it would amount to the higher offence covered by and punishable under Article 245. (1)

To warrant a conviction under article 246, it must be proved that the defendant intended the administration of the poison, *etc.*, to injure, aggrieve or annoy the prosecutor. (2)

Whether the thing is a noxious thing or not may depend upon the quantity administered, some drugs being innoxious in small, and noxious in large quantities. Thus, where the prisoner was indicted under sec. 24 of 24 and 25 Vic., c. 100, (which corresponds with the above article 246), and the evidence was that he had administered cantharides to the prosecutrix, that a large dose of cantharides is poisonous, but that the quantity which he administered was insufficient to produce any effect upon the human system, it was held, by *Cockburn*, C. J., and *Hawkins*, J., that the prisoner could not be convicted of administering a "destructive and noxious thing," notwithstanding that he administered it with intent to injure and annoy. (3)

In Wilkins case, *supra*, the defendant had administered cantharides to a woman with intent to excite her sexual passion and desire, in order that he

(1) Tulley *v.* Corrie, 10 Cox, 640.
(2) R. v. Wilkins, L. & C. 89 ; 31 L. J. (M. C.) 72.
(3) R. v. Hennah, 13 Cox, 547. See comments under article 272, *post*.

might obtain connection with her; and it was held that this was an administering with intent to "injure, aggrieve and annoy" her.

In another case the prisoner was indicted for having caused to be taken a certain noxious thing, namely, half an ounce of oil of juniper, with intent to procure miscarriage, and the evidence was that oil of juniper in considerably less qantities than half an ounce might be taken without any ill effect, but that half an ounce produces ill effects, and to a pregnant woman is dangerous. *Held*, that the half ounce of juniper oil was a "noxious thing." (1)

247. Causing bodily injuries by explosives.—Every one is guilty of an indictable offence and liable to imprisonment for life who unlawfully and by the explosion of any explosive substance, burns, maims, disfigures, disables or does any grievous bodily harm to any person. R.S.C., c. 162, s. 21.

248. Attempt to cause bodily injuries by explosives.—Every one is guilty of an indictable offence and liable, in case (*a*) to imprisonment for life and in case (*b*.) to fourteen years' imprisonment, who unlawfully—

(*a*.) with intent to burn, maim, disfigure or disable any person, or to do some grievous bodily harm to any person, whether any bodily harm is effected or not:—

(i.) causes any explosive substance to explode;

(ii.) sends or delivers to, or causes to be taken or received by, any person any explosive substance, or any other dangerous or noxious thing;

(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.

Article 3 (*i*), *ante*, defines *explosive substance* as being and including;—"any materials for making an explosive substance; also any apparatus, machine, implement, or materials used, or intended to be used, or adapted for causing, or aiding in causing, any explosion in or with any explosive substance; and also any part of any such apparatus, machine or implement."

249. Setting Spring Guns and Man Traps.—Every one is guilty of an indictable offence and liable to five years' imprisonment who sets or places, or causes to be set or placed, any spring-gun, man-trap, or other engine calculated to destroy human life, or inflict grievous bodily harm, with the intent that the same or whereby the same may destroy, or inflict grievous bodily harm upon, any trespasser or other person coming in contact therewith.

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(1) R. v. Cramp, 5 Q. B. D. 307; 49 L. J. (M. C.) 44.

2. Every one who knowingly and wilfully permits any such spring-gun, man-trap or other engine which has been set or placed by some other person, in any place which is in, or afterwards comes into his possession or occupation, to continue so set or placed shall be deemed to have set or placed such gun, trap or engine with such intent as aforesaid.

3. This section does not extend to any gin or trap usually set or placed with the intent of destroying vermin or noxious animals. R.S.C., c. 162, s. 24.

This article applies to instruments set with an intention to destroy *human life* or to inflict grievous bodily harm upon *human beings*, or whereby grievous bodily harm is actually done to a human being, and therefore it would not apply to *dog-spears* set by a man in his own land. (1)

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.

As to endangering *property* by mischief on railways, *see* article 489, et seq., *post*.

251. Negligently endangering the safety of persons on railways. —Every one is guilty of an indictable offence and liable to two years' imprisonment who, by any unlawful act, or by any wilful omission or neglect of duty, endangers or causes to be endangered the safety of any person conveyed or being in or upon a railway, or aids or assists therein. R.S.C., c. 162, s. 27.

(1) Jordin v. Crump, 8 M. & W. 782; Arch. Cr. Pl. & Ev. 21 Ed. 775.

A passenger railway line constructed and completed under the power conferred by an act of parliament, but not yet begun to be used for the conveyance of passengers, but only for the carriage of materials and workmen was held to be within the English act against mischief on railways. (l)

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.

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.

254. Preventing the saving of a shipwrecked person's life.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who,

(*a.*) prevents or impedes, or endeavours to prevent or impede any *shipwrecked person* in his endeavour to save his life; or

(*b.*) who without reasonable cause prevents, or impedes, or endeavours to prevent or impede, any person in his endeavour to save the life of any *shipwrecked person*. R.S.C., c. 81, s. 36.

Under article 3 (*x*) the term "*shipwrecked person*" includes "any person belonging to, on board of or having quitted any vessel wrecked, stranded, or in distress at any place in Canada."

255. Leaving holes in the ice and excavations, unguarded.—Every one is guilty of an offence and liable, on summary conviction, to a fine or imprisonment with or without hard labour (or both) who—

(*a.*) cuts or makes, or causes to be cut or made, any hole, opening, aperture or place, of sufficient size or area to endanger human life, through the ice on any navigable or other water open to or frequented by the public, and leaves such hole, opening, aperture or place, while it is in a state dangerous to human life, whether the same is frozen over or not, uninclosed by bushes or trees or unguarded by a guard or fence of sufficient height and strength to prevent any person from accidentally riding, driving, walking, skating or falling therein; or

(*b.*) being the owner, manager or superintendent of any abandoned or unused mine or quarry or property upon or in which any excavation has been or is hereafter made, of a sufficient area and depth to endanger human life, leaves the same unguarded and uninclosed by a guard or fence of sufficient height and strength to prevent any person from accidentally riding, driving, walking or falling thereinto; or

(l) R. v. Bradford, Bell, 268; 29 L. J. (M. C.), 171.

(*c.*) omits within five days after conviction of any such offence to make the inclosure aforesaid or to construct around or over such opening or excavation a guard or fence of such height and strength.

2. Every one whose duty it is to guard such hole, opening, aperture or place is guilty of manslaughter, if any person loses his life by accidentally falling therein while the same is unguarded. R.S.C., c. 162, ss. 29, 30, 31 and 32.

256. Sending Unseaworthy Ships to Sea.—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 Vict., c. 22, s. 3.

257. Taking Unseaworthy Ships to Sea.—Every one is guilty of an indictable offence and liable to five years' imprisonment who, being the master of a ship registered in Canada knowingly takes such ship to sea, or on a voyage on any of the inland waters of Canada, or on a voyage from any port or place on the inland waters of Canada to any port or place on the inland waters of the United States, or on a voyage from any port or place in the United States to any port or place on the inland waters of Canada, in such unseaworthy state, by reason of overloading or underloading or improper loading, or by reason of being insufficiently manned, or from any other cause, that the life of any person is likely to be endangered thereby, unless he proves that her going to sea or on such voyage in such unseaworthy state was, under the circumstances, reasonable and justifiable. 52 V., c. 22, s. 3.

Article 546, *post*, provides that no person shall be prosecuted for any offence under the above two sections, 256 and 257, without the consent of the Minister of Marine and Fisheries.

PART XX.

ASSAULTS.

258. Definition.—An assault is the act of intentionally applying force to the person of another, directly or indirectly, or attempting or threatening, by any act or gesture, to apply force to the person of another, if the person making the threat has, or causes the other

to believe, upon reasonable grounds, that he has, present ability to effect his purpose, and in either case, without the consent of the other or with such consent, if it is obtained by fraud.

The following are given as examples of what amounts to an assault, namely; striking at another with a cane, stick or the fist, although the person striking misses his aim; (1) drawing a sword or bayonet, or throwing a bottle or glass with intent to strike; presenting a loaded gun at a man who is within the distance to which the gun will carry; (2) pointing a pitchfork at him when with in reach of it. A person, who presents a firearm, which he knows to be unloaded, at another, who does not know that it is unloaded, and so near that it might produce injury, if it were loaded and went off, commits an assault. (3) (See article 109, (*ante* p 61), which makes this a substantive offence punishable by $100 fine).

It has been held that a magistrate has no right to order the medical examination of the person of a prisoner, and that, therefore, such an examination, pursuant to such an order, of the person of a female, in custody, charged with concealment of birth, and made against her consent, was an assault. (4)

If a medical man unnecessarily strip a female patient naked, under pretence that he cannot otherwise judge of her illness, it is an assault. (5)

If A. advance, in a threatening attitude, towards B., to strike him, and he is stopped just before he is near enough for his blow to take effect, it is an assault (6)

The following are also examples of what under the above article would be an assault, and what, under the common law would amount to a battery, namely; any touching or laying hold (however trifling) of another's body or clothes, in an angry, revengeful, rude, insolent or hostile manner; (7) as for instance, thrusting or pushing him, in anger; holding him by the arm; spitting in his face; jostling him out of the way; pushing another man against him; (8) throwing a squib at him; striking a horse upon which he is riding, whereby he is thrown. (9)

It is a good defence to prove that the alleged assault happened by misadventure. Thus, if a horse run away with his rider and run against a man it would be no assault and the rider would not be punishable, unless he were guilty of some culpable negligence. (10)

It is also a good defence to prove that the alleged assault happened whilst the defendant was engaged in an amicable contest, as, some sport or game which was not unlawful nor dangerous. (11)

It is likewise a good defence to prove that the alleged assault was merely the lawful and moderate correction of a child by its parent, or of a servant by his master, or of a scholar by his teacher. (12)

See *ante*, p. 144 et seq., as to self-defence, etc.

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(1) 2 Roll. Abr. p. 554, pl. 45.
(2) R. v. St. George, 9 C. & P. 483; R. v. Baker, 1 C. & K. 254; Osborn v. Veitch, 1 F. & F. 317; Read v. Coker, 15 C. B. 850; 1 Hawk, c. 62, s. 1.
(3) R. v. St. George, *supra*.
(4) Agnew v. Jobson, 13 Cox, 625.
(5) R. v. Rosinski, 1 Moo. C. C. 12.
(6) Stephens v. Myers, 4 C. & P. 660.
(7) 1 Hawk. c. 62, s. 2; Rawlings v. Till, 3 M. & W. 28; Coward v. Baddeley, 4 H. & N. 278; 28 L. J. (Exch.) 290.
(8) Bull. N. P. 16.
(9) 1 Mod 24; W. Jones, 444; Arch. Cr. Pl. & Ev. 21 Ed. 758.
(10) Gibbons v. Pepper, 2 Salk, 637; *See also*, comments on excusable homicide, *ante* pp. 143, 144.
(11) Fost 260; Com. Dig. Pleader, 3 M. 18.
(12) 1 Hawk. c. 60, s. 23; c. 62, s. 2; 2 Bos. & P. 224.

The defendant may justify an assault by proving that he committed it in defence of his possession, as, for instance, to restrain the prosecutor from taking his goods, or to remove the prosecutor out of the defendant's house, or to prevent him from entering it, provided the force used in any of these cases be no more than is necessary. (1)

In the case of a trespass, without actual force, the owner of the close, etc., or the occupier or possessor of a house, etc., must first request the trespasser to depart before he can justify laying his hand on him for the purpose of removing him; and even, after refusal, he can only justify such force as is necessary to effect his removal; but, if the trespasser use force then the owner or possessor may oppose force to force. (2)

As to justification of peace officers using force in making arrests, serving process, etc., see article 31 *et* seq. *ante*.

259. Indecent assaults on females.—Every one is guilty of an indictable offence and liable to two years' imprisonment, and to be whipped, who—

(*a*.) indecently assaults any female; or

(*b*) does anything to any female by her consent which but for such consent would be an indecent assault, such consent being obtained by false and fraudulent representations as to the nature and quality of the act. 53 V., c. 37, s. 12.

If, on an indictment for an indecent assault, it appears that the woman consented to the assault, under circumstances shewing that the consent was obtained by fraud, such consent will constitute no defence; such a case being expressly provided for by sub-section (*b*) of the above article. (3)

In the case of R. v. Case, *supra*, the facts were these. Case, a medical man had connection with a girl fourteen years of age under the pretence that he was thereby treating her medically for the complaint for which he was attending her, she making no resistance so ely from the *bonâ fide* belief that such was the case. It was held that this was certainly an indecent assault, and probably a rape.

Where on the trial of an indictment for indecent assault the prosecutrix denies, on cross-examination, having had intercourse with a third person named to her, such person cannot be called to contradict her upon this answer. (4) If, however, on cross-examination, the prosecutrix denies having had previous intercourse *with the accused*, evidence may, in that case be given to contradict her. (5)

Under the Canada Evidence Act, 1893, sec. 4, *post*, the defendant, and also the husband or wife of the defendant, is, in these cases, as well as in all other criminal cases, a competent, though not compellable witness.

Evidence of child.—Article 685 contains the following provisions;

"1. Where, upon the hearing or trial of any charge for carnally knowing or attempting to carnally know a girl under fourteen or of

(1) See articles 48, 49, and 50, *ante*, p. 32; and articles 53 and 54, *ante*, pp. 33 and 34; *see, also*, 2 Rol. Abr. 548, 549.

(2) Weaver v. Bush, 8 T. R. 78; 2 Salk. 641. *See* Illustrations; *ante*, pp. 33 and 34.

(3) For decisions to the same effect, *see* R. v. Case, 1 Den. 580; 19 L. J. (M. C.) 174; R. v. Bennett, 4 F. & F. 1105.

(4) R. v. Holmes, L. R., 1 C. C. R. 334; 41 L. J. (M. C.) 12.

(5) R. v. Riley, 18 Q. B. D. 481; 56 L. J. (M. C.) 52.

any charge under section two hundred and fifty-nine for indecent assault, the girl in respect of whom the offence is charged to have been committed, or any other child of tender years who is tendered as a witness, does not, in the opinion of the court or justices, understand the nature of an oath, the evidence of such girl or other child of tender years may be received though not given upon oath if, in the opinion of the court or justices, as the case may be, such girl or other child of tender years is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.

"2. But no person shall be liable to be convicted of the offence, unless the testimony admitted by virtue of this section, and given on behalf of the prosecution, is corroborated by some other material evidence in support thereof implicating the accused.

"3. Any witness whose evidence is admitted under this section is liable to indictment and punishment for perjury in all respects as if he or she had been sworn."

Section 25 of the *Canada Evidence Act* 1893, *post*, extends these provisions to all other legal proceedings, besides cases of indecent assault, etc.

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 person. R.S.C., c. 157, s. 2. (*As amended by* 56 *Vict. c.* 32.)

261. Consent of child under fourteen no defence.—It is no defence to a charge or indictment for any indecent assault on a young person under the age of fourteen years to prove that he or she consented to the act of indecency. 53 V., c. 37, s. 7.

This article will apply to all offences, which include an indecent assault, committed either upon male or female children.

262. Assaults occasioning 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.

263. Aggravated assaults.—Every one is guilty of an indictable offence and liable to two years' imprisonment who—

(*a.*) assaults any person with intent to commit any indictable offence; or

(*b.*) assaults any public or peace officer engaged in the execution of his duty, or any person acting in aid of such officer; or

(*c.*) assaults any person with intent to resist or prevent the lawful apprehension or detainer of himself, or of any other person, for any offence; or

(*d.*) assaults any person in the lawful execution of any process against any lands or goods, or in making any lawful distress or

seizure, or with intent to rescue any goods taken under such process, distress or seizure. R.S.C., c. 162, s. 34.

(*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.

In the case of an assault upon a public or peace officer the fact that the accused did not know that the person assaulted was a peace officer, or that he was acting in the execution of his duty will be no defence. (1)

As to *resisting* or *wilfully obstructing* a public officer, see art. 144, *ante*, p. 85.

264. Kidnapping.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who, *without lawful authority*, forcibly seizes and confines or imprisons any other person within Canada, or kidnaps any other person with intent—

(*a.*) to cause such other person to be secretly confined or imprisoned in Canada against his will; or

(*b.*) to cause such other person to be unlawfully sent or transported out of Canada against his will; or

(*c.*) to cause such other person to be sold or captured as a slave, or in any way held to service against his will.

2. Upon the trial of any offence under this section the non-resistance of the person, so kidnapped or unlawfully confined, thereto, shall not be a defence, uuless it appears that it was not caused by threats, duress or force or exhibition of force. R.S.C., c. 162, s. 46.

The intent applies as well to the seizing and confining or imprisoning as to the kidnapping (2).

The expression "kidnapper" seems to have been derived from "*kid*",—the slang name for a child,—and "*nappe*", (Danish), signifying, to snatch at; and originally meant, one who snatches at children, or "*kids*." (3)

At common law, kidnapping, or the stealing and carrying away or secreting of any person was an offence formerly punishable by fine, imprisonment, and the pillory. (4)

By the Roman law *plagium*, (manstealing, or kidnapping), was the abduction or stealing of a free person, or of the slave of another. By the *Lex Fabia* the penalty was a pecuniary one; but, after the crime of kidnapping became common, the punishment was increased to banishment, and, in some cases, was capital. (5)

Under the old Jewish law manstealing was punishable with death. (6)

The question sometimes arises, in connection with the law of extradition, as to the right to kidnap, and the effect of kidnapping, in a foreign state, a person who has taken flight after committing a crime in his own country, and of forcibly

(1) R. v. Forbes, 10 Cox, 362; Arch. Cr. Pl. & Ev. 21 Ed. 784.
(2) Cornwall v. R., 33 U. C. Q. B. 106: Bur. Dig. 246.
(3) Brewer's Dict. 475.
(4) 1 East P. C. c. 9, s. 3, p. 429: Rex v. Baily, Comb. 10; 4 Bl. Com. 219.
(5) Lord Mackenzie's Rom. L. 361, 362.
(6) Deut. chap. 24, v. 7.

bringing him back to the country from whose justice he has escaped. A case of this kind came up in the United States Supreme Court. in December 1886, upon an appeal against a judgment of the Supreme Court of Illinois confirming a conviction upon an indictment tried in that state for larceny. In that case it appears that, after committing the offence in the State of Illinois, the prisoner fled to and was afterwards kidnapped in a foreign country and brought back by force, against his will, into the jurisdiction of the state whose law he had violated: and the Supreme Court held that it could give no relief, that the treaties of extradition to which the United States are parties do not guarantee a fugitive from the justice of one of the countries an asylum in the other. and do not give him any greater or more sacred right of asylum than he had before, but that they only make provision that, for certain crimes, he shall be deprived of that asylum and be surrendered to justice, in the mode prescribed by the treaties. The Court further held that a trespass, committed by a kidnapper, unauthorized by and not professing to act under any authority from either government, was not a case provided for in the extradition treaty, that the remedy would be by a proceeding against such kidnapper by the government whose law was violated, or else by the party injured ; and that as to how far the forcible transfer of the fugitive, so as to bring him back into the state where his offence was committed, might have been set up, *before he was tried*, as a ground against the right to try him, that was the province of the state Court to decide. The text of the judgment as delivered by Miller, J., is as follows:

"The plaintiff in error, Frederick M. Ker, was indicted, tried and convicted in the Criminal Court of Cook county, Illinois, for larceny. The indictment also included charges of embezzlement. During the proceedings connected with the trial, the defendant presented a plea in abatement, which, on demurrer, was overruled, and the defendant refusing to plead further, a plea of not guilty was entered for him, according to the statute of that state, by order of the court, on which the trial and conviction took place.

"The substance of the plea in abatement, which is a very long one, is that the defendant being in the city of Lima, in Peru, after the offences were charged to have been committed, was in fact kidnapped and brought to this country against his will. His statement is that application having been made by the parties who were injured, Governor Hamilton, of Illinois, made his requisition in writing to the secretary of state of the United States. for a warrant requesting the extradition of the defendant by the executive of the Republic of Peru, from that country to Cook county; that on the 1st day of March, 1883, the president of the United States issued his warrant, in due form, directed to Henry G. Julian, as messenger, to receive the defendant from the authorities of Peru, upon a charge of larceny, in compliance with the treaty between the United States and Peru on that subject ; that the said Julian, having the necessary papers with him, arrived in Lima, but, without presenting them to any officer of the Peruvian government, or making any demand on that government for the surrender of Ker, forcibly and with violence arrested him, placed him on board the United States vessel *Essex*, in the harbor of Callao, kept him a close prisoner until the arrival of that vessel at Honolulu, where, after some detention, he was transferred in the same forcible manner on board another vessel, to wit, the *City of Sydney*, in which he was carried a prisoner to San Francisco, in the State of California. The plea then states that before his arrival in that city, Governor Hamilton had made a requisition on the governor of California, under the laws and constitution of the United States, for the delivery up of the defendant as a fugitive from justice, who had escaped to that state on account of the same offences charged in the requisition on Peru and in the indictment in this case. The requisition arrived, as the plea states, and was presented to the governor of California, who made his order for the surrender of the defendant to the person appointed by the governor of Illinois. namely, one Frank Warner, on the 25th day of June, 1883. The defendant arrived in the city of San Francisco on the 9th day of July thereafter, and was immediately placed in the custody of Warner, under the order of the governor of California, and, still a prisoner, was transferred by him to Cook county, where the process of the Criminal Court was served upon him and he was held to answer the indictment already mentioned.

"The plea is very full of averments that the defendant protested, and was

refused any opportunity whatever, from the time of his arrest in Lima until he was delivered over to the authorities of Cook county, of communicating with any person or seeking any advice or assistance in regard to procuring his release by legal process or otherwise; and he alleges that this proceeding is a violation of the provisions of the treaty between the United States and Peru, negotiated in 1870, which was finally ratified by the two governments and proclaimed by the president of the United States, July 27th, 1874. 18 Stat. 719.

"The judgment of the Criminal Court of Cook county, Illinois, was carried by writ of error to the Supreme Court of that state, and there affirmed, against which judgment the present writ of error is directed. The assignments of error made here are as follows:

"'*First.* That said Supreme Court of Illinois erred in affirming the judgment of said Criminal Court of Cook county, sustaining the demurrer to plaintiff in error's plea to the jurisdiction of said Criminal Court.

"'*Second.* That said Supreme Court of Illinois erred in its judgment aforesaid, in failing to enforce the full faith and credit of the federal treaty with the Republic of Peru, invoked by plaintiff in error in his said plea to the jurisdiction of said Criminal Court.'

"The grounds upon which the jurisdiction of this court is invoked may be said to be three, though from the briefs and arguments of the counsel it is doubtful whether, in point of fact, more than one is relied upon. It is contended in several places in the brief that the proceedings in the arrest in Peru, and the extradition and delivery to the authorities of Cook County, were not 'due process of law,' and we may suppose, although it is not so alleged, that this reference is to that clause of article 14 of the amendments to the constitution of the United States which declares that no state shall deprive any person of life, liberty, or property, 'without due process of law.' The 'due process of law' here guaranteed is complied with when the party is regularly indicted by the proper grand jury in the state court, has a trial according to the forms and modes prescribed for such trials, and when in that trial and proceedings, he is deprived of no rights to which he is lawfully entitled. We do not intend to say that there may not be proceedings previous to the trial, in regard to which the prisoner could invoke in some manner the provisions of this clause of the constitution, but, for mere irregularities in the manner in which he may be brought into the custody of the law, we do not think he is entitled to say that he should not be tried at all for the crime with which he is charged in a regular indictment. He may be arrested for a very heinous offence by persons without any warrant, or without any previous complaint, and brought before a proper officer, and this may be in some sense said to be 'without due process of law.' But it would hardly be claimed that after the case had been investigated and the defendant held by the proper authorities to answer for the crime, he could plead that he was first arrested 'without due process of law.' So, here, when found within the jurisdiction of the State of Illinois and liable to answer for a crime against the laws of that state, unless there was some positive provision of the constitution or of the laws of this country violated in bringing him into court, it is not easy to see how he can say that he is there 'without due process of law,' within the meaning of the constitutional provision.

"So, also, the objection is made that the proceedings between the authorities of Illinois and of California were not in accordance with the act of congress on that subject, and especially that, at the time the papers and warrants were issued from the governors of California and Illinois, the defendant was not within the State of California and was not there a fugitive from justice. This argument is not much pressed by counsel, but the effort is to connect it as a part of the continued trespass and violation of law which accompanied the transfer from Peru to Illinois. It is sufficient to say, in regard to that part of this case, that when the governor of one state voluntarily surrenders a fugitive from the justice of another state to answer for his alleged offences, it is hardly a proper subject of inquiry on the trial of the case to examine into the details of the proceedings by which the demand was made by one state and the manner in which it was responded to by the other. The case does not stand, when the party is in court and required to plead to an indictment, as it would have stood upon a writ of *habeas corpus* in California, or in any states through which he

was carried in the progress of his extradition, to test the authority by which he was held; and we can see in the mere fact that the papers under which he was taken into custody in California were prepared and ready for him on his arrival from Peru, no sufficient reason for an abatement of the indictment against him in Cook county, or why he should be discharged from custody without a trial.

"But the main proposition insisted on, now, is that by virtue of the treaty of extradition with Peru the defendant acquired by his residence in that country a right of asylum, a right to be free from molestation for the crime committed in Illinois, a positive right in him that he should only be forcibly removed from Peru to the State of Illinois in accordance with the provisions of the treaty, and that this right is one which he can assert in the courts of the United States in all cases, whether the removal took place under proceedings sanctioned by the treaty, or under proceedings which were in total disregard of that treaty, amounting to an unlawful and unauthorised kidnapping.

"This view is presented in various forms and repeated in various shapes in the argument of Counsel. The fact that this question was raised in the Supreme Court of Illinois may be said to confer jurisdiction on this court, because, in making this claim, the defendant asserted a right under a treaty of the United States, and, whether the assertion was well founded or not, this court has jurisdiction to decide it; and we proceed to inquire into it.

"There is no language in this treaty, or in any other extradition treaty made by this country, which says in terms that a party fleeing from the United States to escape punishment for crime becomes thereby entitled to an asylum in the country to which he has fled; indeed, the absurdity of such a proposition would at once prevent the making of a treaty of that kind. It will not be for a moment contended that the government of Peru could not have ordered Ker out of the country on his arrival, or at any period of his residence there. If this could be done, what becomes of his right of asylum?

"Nor can it be doubted that the government of Peru could of its own accord, without any demand from the United States, have surrendered Ker to an agent of the State of Illinois, and that such surrender would have been valid within the dominions of Peru. It is idle, therefore, to claim that, either by express terms or by implication, there is given to a fugitive from the justice of one of these countries any right to remain and reside in the other; and if the right of asylum means anything, it must mean this. The right of the government of Peru voluntarily to give a party in Ker's condition an asylum in that country, is quite a different thing from the right in him to demand and insist upon security in such an asylum. The treaty so far as it regulates the right of asylum at all, is intended to limit this right in the case of one proved to be a criminal fleeing from justice, so that, on proper demand and proceedings had therein, the government of the country of the asylum shall deliver him up to the country in which the crime was committed. And to this extent alone, the treaty regulates or imposes a restriction upon the right of the government of the country of the asylum to protect the criminal from removal therefrom.

"In the case before us the plea shews that although Julian went to Peru with the necessary papers to procure the extradition of Ker under the treaty, those papers remained in his pocket and were never brought to light in Peru; that no steps were taken under them, and that Julian, in seizing upon the person of Ker and carrying him out of the territory of Peru into the United States, did not act nor profess to act, under the treaty. In fact, that treaty was not called into operation, was not relied upon, was not made the pretext for arrest, and the facts show that it was a clear case of kidnapping within the dominions of Peru, without any pretence of authority under the treaty or from the government of the United States.

"In the case of *United States v. Rauscher*, (1) just decided, and considered with this, the effect of extradition proceedings under a treaty was very fully considered, and it was there held that when a party was duly surrendered by proper proceedings, under the treaty of 1842 with Great Britain, he came to this country clothed with the protection which the nature of such proceedings and

(1) United States v. Rauscher, 11 Cr. L. Mag. 178.

the true construction of the treaty gave him. One of the rights with which he was thus clothed, both in regard to himself and in good faith to the country which had sent him here, was that he should be tried for no other offence than the one for which he was delivered under the extradition proceedings. If Ker had been brought to this country by proceedings under the treaty of 1870–1874 with Peru, it seems probable, from the statement of the case in the record, that he might have successfully pleaded that he was extradited for larceny, and convicted, by the verdict of a jury, of embezzlement; for the statement in the plea is that the demand made by the president of the United States, if it had been put in operation, was for an extradition for larceny, although some forms of embezzlement are mentioned in the treaty as subjects of extradition. But it is quite a different case when the plaintiff in error comes to this country in the manner in which he was brought here, clothed with no rights which a proceeding under the treaty could have given him, and no duty which this country owes to Peru or to him under the treaty.

"We think it very clear, therefore, that in invoking the jurisdiction of this court upon the ground that the prisoner was denied a right conferred upon him by a treaty of the United States, he has failed to establish the existence of any such right.

"The question of how far his forcible seizure in another country, and transfer by violence, force, or fraud, to this country, could be made available to resist trial in the state court, for the offence now charged upon him, is one which we do not feel called upon to decide, for in that transaction we do not see that the constitution, or laws, or treaties, of the United States guarantee him any protection. There are authorities of the highest respectability which hold that such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offence, and presents no valid objection to his trial in such court. (1)

"However this may be, the decision of that question is as much within the province of the state court, as a question of common law, or of the law of nations, of which that court is bound to take notice, as it is of the courts of the United States. And though we might or might not differ with the Illinois court on that subject, it is one in which we have no right to review their decision.

"It must be remembered that this view of the subject does not leave the prisoner or the government of Peru without remedy for his unauthorized seizure within its territory. Even this treaty with that country provides, for the extradition of persons charged with kidnapping, and on demand from Peru, Julian, the party who is guilty of it, could be surrendered and tried in its courts for this violation of its laws. The party himself would probably not be without redress, for he could sue Julian in an action of trespass and false imprisonment, and the facts set out in the plea would without doubt sustain the action. Whether he could recover a sum sufficient to justify the action would probably depend upon moral aspects of the case, which we cannot here consider.

"We must, therefore, hold that so far as any question in which this court can revise the judgment of the Supreme Court of the State of Illinois is presented to us, the judgment must be affirmed." (2)

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.

(1) The learned judge here cites the following authorities: *Ex parte Scott*, 9 Barn. & C. 446 (1829); *Lopez & Sattler's Case*, 1 Dears. & B. C. C. 525; *State* v. *Smith*, 1 Bail. (S. C.) L. 283 (1829); *S. C.*, 19 Am. Dec. 679; *State* v. *Brewster*, 7 Vt. 118 (1835); *Dow's Case*, 18 Pa. St. 37 (1851); *State* v. *Ross and Mann*, 21 Iowa 467 (1866); *Ship Richmond* v. *United States* (*The Richmond*), 9 Cranch (U. S.) 102.

(2) Ker v. State of Ill., 9 Cr. L. Mag., 201.

See comments under article 258, *ante*.

Under the provisions of part LV, *post*, (Articles 782-802), magistrates are empowered, under certain circumstances, and under certain conditions, to try, summarily, persons charged with certain indictable offences,—the consent of the accused being required in some cases, and, in some cases, not. Amongst the indictable offences thus subject, under part LV, to summary trial, are included cases of aggravated assault, indecent assaults, etc., as will be seen by article 783, which provides, amongst other things, that,

"Whenever any person is charged before a magistrate 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

"With having committed an assault upon any female whatsoever, or upon any male child whose age does not, in the opinion of the magistrate, exceed fourteen years, such assault being of a nature which cannot, in the opinion of the magistrate, be sufficiently punished by a summary conviction before him under any other part of this Act, and such assault, if upon a female, not amounting, in his opinion, to an assault with intent to commit a rape; or

"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:—

"The magistrate may, subject to the provisions hereinafter made, hear and determine the charge in a summary way."

By articles 797, 798 and 799, it is provided, in reference to these summary trials of indictable offences, that, "whenever the magistrate finds the offence not proved, he shall dismiss the charge, and make out and deliver to the person charged a certificate under his hand stating the fact of such dismissal;" that "every conviction under this part shall have the same effect as a conviction upon indictment for the same offence; and that "every person who obtains a certificate of dismissal or is convicted under the provisions of this part, shall be released from all further or other criminal proceedings *for the same cause.*"

Provisions similar to these are contained in the Imperial Statute, 42-43 Vict., c. 49, (*The summary jurisdiction Act* 1879.)

Provision is also made by article 864, *post*, that a charge of assault and battery may be tried summarily in any case where neither of the parties objects: but, if either party objects it cannot be so tried; and even in cases where the parties do not object the justice may, if he thinks the assault or battery complained of a fit subject for prosecution by indictment, deal with it as such.

Subsection 8 of article 842, *post*, enacts that no justice shall hear and determine any case of assault and battery in which any title to or interest in lands or real property arises.

By articles 865 and 867, (which are similar, in effect, to sections 44 and 45 of the English Statute 24-25 Vict., c. 100,) it is enacted that; "If the justice, upon the hearing of any case of assault or battery *upon the merits* where the complaint is preferred by or on behalf of the person aggrieved, under the next preceding section, deems the offence not to be proved, or finds the assault or battery to have been justified, or so trifling as not to merit any punishment, and accordingly dismisses the complaint, he shall *forthwith* make out a certificate under his hand stating the fact of such dismissal, and shall deliver such certificate to the person against whom the complaint was preferred;" and that "If the person against whom any such complaint has been preferred, by or on the behalf of the person aggrieved, obtains such certificate, or, having been convicted, pays the whole amount adjudged to be paid, or suffers the imprisonment, or imprisonment with hard labour, awarded, he shall be released from all further or other proceedings, civil or criminal, *for the same cause.*"

The certificate of dismissal can only be granted when there has been a full hearing *upon the merits*. If the certificate is granted on a withdrawal of the

charge, before hearing, it will be no bar to subsequent proceedings for the same assault. (1)

The effect of the certificate of dismissal, when granted, on an acquittal, or, of payment of the penalty or suffering the punishment imposed, on a conviction, as the case may be, is to release the defendant from all other proceedings *for the same cause.*

It has been held, in England, that the meaning and intent of the enactments above mentioned, in connection with summary trials, is that when a case so summarily dealt with has been dismissed by the magistrate or justice, *on its merits*, the defendant has the right, *ex debito justitiæ*, to receive from the magistrate or justice, the certificate of dismissal, and that the clause which refers to the making out of the certificate, and which contains the word *forthwith*, means that such certificate is to be made out *forthwith* on the defendant making application for it. (2)

A summary conviction for assault has, accordingly, been held to be a bar to a subsequent indictment for a felonious stabbing based on the same transaction: (3) and it has been held a bar to an indictment for unlawful wounding and an assault occasioning actual bodily harm, arising out of the same circumstances. (4)

A summary conviction for assault has, however, been held not to be a bar to a subsequent indictment for manslaughter, in a case where the man, who was assaulted, afterwards died in consequence of the assault. (5)

It appears that the production of the certificate of dismissal is of itself sufficient evidence of such dismissal, without proof of the signature of the magistrate or justice; (6) and if the defendant appeared before the magistrate or justice, the recital, in the certificate, of the fact of a complaint having been made and of a summons having been issued, is sufficient evidence of these facts without producing the complaint or summons. (7)

As already seen the consent of the accused is required in order to give a magistrate jurisdiction to summarily dispose of some of the indictable offences mentioned in Article 783. But with regard to some others of such offences,—e. g. charges against persons for being keepers or inmates or habitual frequenters of disorderly houses,—the magistrate's summary jurisdiction is by article 784, *post*, made absolute and independent of the consent of the accused.

Article 784, sub-section 2, also makes the magistrate's summary jurisdiction absolute and independent of any consent, in regard to all the offences mentioned in article 783, in cases in which "any person who being a seafaring person and only transiently in Canada, and having no permanent domicile therein, is charged, either within the city of Quebec as limited for the purpose of 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*, (8) 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."

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(1) Reed v. Nutt, 24 Q. B. D. 669.

(2) Hancock v. Somes, 1 E. & E. 795; 28 L. J. (M. C.) 196; Costar v. Hetherington, 1 E & E. 802; 28 L. J. (M. C.) 198.

(3) R. v. Stanton, 5 Cox, 324; R. v. Walker, 2 M. & Rob. 446.

(4) R. v. Elrington, 1 B. & S. 688; 31 L. J. (M. C.) 14; R. v. Miles, 24 Q. B. D. 423; 59 L. J. (M. C.) 56.

(5) R. v. Morris, L. R., 1 C. C. R. 90; 36 L. J. (M. C.) 84.

(6) *See*, The Canada Evidence Act 1893, sec. 10, *post*.

(7) R. v. Westley, 11 Cox, 139: Arch. Cr. Pl. & Ev. 21 Ed. 155.

(8) The offences, here referred to, include,—as already shown, *ante*, p. 183, —aggravated assaults, wounding, indecent assaults, &c. But *see* full list of these offences in article 783, itself, *post*.

Subsection 3 of article 784, moreover, provides that, "the jurisdiction of a stipendiary magistrate in the province of Prince Edward Island, and of a magistrate in the district of Keewatin, under this part, is absolute without the consent of the person charged."

PART XXI.

RAPE AND PROCURING ABORTION.

RAPE.

266. Definition.—Rape is the act of a man having carnal knowledge of a woman, who is not his wife, without her consent, or with consent which has been extorted by threats or fear of bodily harm, or obtained by personating the woman's husband, or by false and fraudulent representations as to the nature and quality of the act.

2. No one under the age of fourteen years can commit this offence.

"3. Carnal knowledge is complete upon penetration to any, even the slightest degree, and even without the emission of seed."

Paragraph 3 has been transferred by the *Amending Act* of 1893, to Part I, *ante*

267. Punishment.—Every one who commits rape is guilty of an indictable offence and liable to suffer death, or to imprisonment for life. R.S.C., c. 162, s. 37.

With reference to rape committed by personating a woman's husband, section 4 of the English *Criminal law amendment act*, 1885, (48-49 Vict., c. 69,) is as follows:—

"Whereas doubts have been entertained whether a man who induces a married woman to permit him to have connexion with her by personating her husband is or is not guilty of rape, it is hereby enacted and declared that every such offender shall be deemed to be guilty of rape."

It seems to have always been the law, as stated now in subsection 2 of the above article 266, that no one under the age of fourteen years can commit a rape. The law presumes a boy under the age of fourteen years of age to be incapable of committing a rape; (1) and no evidence can be admitted against him to shew that he has, in fact, attained the full state of puberty and was capable of committing the crime. (2)

A husband, too, is legally incapable of committing a rape upon his wife; (3) but a husband may be punished for being present and aiding in the commission of a rape upon his wife, (4) and so may a boy under fourteen be punished for being present and aiding in the commission of the offence. (5)

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(1) 1 Hale 631; R. v. Groombridge, 7 C. & P. 582; R. v. Brimilow, 9 C. & P. 366; 2 Moo. C. C. 122.

(2) R. v. Philips, 8 C. & P. 736; R. v. Jordan, 9 C. & P. 118.

(3) 1 Hale 629.

(4) R. v. Andley, St. Tr. 393

(5) 1 Hale, 620, 639; R. v. Eldershaw, 3 C. & P. 396; R. v. Allen, 1 Den., 364.

The act must have been done without the woman's consent, unless her consent was obtained by threats or fear of bodily harm, or obtained by the false personation or fraud stated in the above article. Therefore, it has been held that, if the connexion took place when the woman was in a state of insensibility, from liquor with which she was made drunk by the accused, (though the liquor was given only to excite her), it was rape (1). It was also held that, where a man got into bed to a woman while she was asleep and knew she was asleep, and had connexion with her while in that state, he was guilty of rape. (2)

It is no excuse that the woman consented at first, if the offence was afterwards actually committed by force or against her will. (3) Even that the woman was a common strumpet, or the mistress of the ravisher is no excuse; (4) although such circumstances as these should, certainly, operate strongly with the jury as to the probability or improbability of the fact that connection was had against the woman's consent.

Although article 181 makes it an indictable offence merely to have carnal connexion with a girl between the ages of fourteen and sixteen years, even with her consent, an indictment for the graver offence of rape will lie against one who *ravishes* such a girl, or has carnal connection with her, without her consent. (5)

Where a medical man, by pretending to be treating, medically, a young girl under fourteen, had connection with her, she being led to believe that it was part of the treatment, the prisoner was held to be guilty of an indecent assault. (6) It would now be a rape, and it was so held to be, in a more recent case, where the prosecutrix, a girl of nineteen, had consulted the prisoner a quack doctor as to her illness, and he, under pretence of performing a surgical operation, had connection with her, she submitting under the belief that he was merely performing the surgical operation, and that belief being wilfully and fraudulently induced by the prisoner. (7)

Although the party who complains of being ravished is a competent witness upon every part of the case, the credibility of her evidence is a matter for the jury to appreciate according to the circumstances. If she be of good reputation and if she make known the offence and seek out the offender without delay, or if the accused take flight; all such circumstances as these will help the probability of her evidence. If on the other hand her reputation is bad, and her evidence be uncorroborated by the testimony of other witnesses; if the place where the alleged outrage took place was one where she might have made herself heard, and she made no outcry; these will have a tendency to throw doubt on her evidence; (8) especially if she be flatly contradicted by the accused, who is now, under the *Canada Evidence Act* 1893, sec. 4, a competent witness.

The defendant may adduce evidence to shew that the woman is of notoriously bad character, unchaste, and of indecent habits, or that she is a common prostitute; or to shew that she has previously had carnal connection with the prisoner of her own free will; (9) but he cannot adduce evidence of other particular acts with other persons, so as to impeach her chastity. (10)

If asked on cross examination whether, outside of the prisoner, she has had carnal connection with other men, named to her in the questions, and if she deny

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(1) R. v. Camplin, 1 Den, 89; 1 C. & K. 746.
(2) R. v. Mayers, 12 Cox, 311.
(3) 1 Hawk. c. 41, s. 7.
(4) 1 Hale, 729.
(5) R. v. Ratcliffe, 10 Q. B. D. 74; 52 L. J. (M. C.) 40.
(6) R. v. Case 1 Den 580; 19 L. J. (M. C.) 174.
(7) R. v. Flattery, 2 Q. B. D. 410; 46 L. J. (M. C.) 130.
(8) 4 Bl. Com. 213.
(9) R. v. Riley, 18 Q. B. D. 481; 56 L. J. (M. C.), 52.
(10) R. v. Hodgson, R. & R. 211; R. v. Clark, 2 Stark, 243; R. v. Barker, 3 C. & P. 589; R. v. Martin, 6 C. & P. 562.

having had any such intercourse with them, her answer will be conclusive and those men cannot be called to contradict her. (1)

As penetration to the slightest degree is sufficient to constitute carnal knowledge, a penetration of such a depth as not to injure the hymen was held sufficient to constitute a rape. (2)

When actual penetration is not proved the defendant may, nevertheless, on an indictment for rape be found guilty,—by virtue of article 711 *post*,—of an attempt to commit a rape, or he may be convicted of an indecent assault, or of a common assault. (See article 713, *post*).

An indictment charged A. with rape, and B. as an abettor. The jury found A. guilty of an attempt at rape and B. of aiding A. in the attempt; and the conviction was affirmed. (3)

The following are some of the older definitions of rape:

EAST.—"Rape is the unlawful carnal knowledge of a woman *by force* and against her will." (4)

COKE,—In the second Institute, gives the following, from the Mirror: "Rape is when a man hath carnal knowledge of a woman *by force* and against her will." (5)

HALE.—"Rape is the carnal knowledge of any woman above the age of ten years *against her will*, and of a woman-child under the age of ten years with or against her will." (6)

HAWKINS.—"It seems that rape is an offence in having unlawful and carnal knowledge of a woman *by force* and against her will. (7)

BLACKSTONE.—Rape is "the carnal knowledge of a woman *forcibly* and against her will." (8)

RUSSELL.—"Rape has been defined to be the having unlawful and carnal knowledge of a woman *by force* and against her will." (9)

These definitions and some of the judicial constructions placed upon the words, "*forcibly*" and "*against her will*," have helped to produce the common notion that, to constitute a rape, there must have been desperate resistance on the part of the woman and the employment of overpowering force on the part of the man.

The present definition as contained in the above article, 266, namely "the act of carnally knowing a woman, *without her consent*," is much better calculated to meet the ends of justice than the old definitions. Bishop argues the matter out, as follows:—

"While, thus, [*during sleep*], there may be rape of a woman who does not resist, one in the normal condition, awake, mentally competent, and not in fear, will oppose with a vehemence and by measures varying with her special nature and the particular circumstances, this greatest of all outrages, *unless she mentally consents*. So that, though in words she objects, if she makes no outcry and no resistance, she, by her conduct, consents, and there is no rape. (10) In just principle, it is believed that the extent and form of the resistance should in

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(1) R. v. Holmes, L. R., 1 C. C. 334; 41 L. J. (M. C.) 12; R. v. Cockcroft 11 Cox, 410; R. v. Hodgson, R. & R. 211.
(2) R. v. Russen, 1 East, P. C. 438, 439; R. v. McRue, 8 C. & P. 641.
(3) R. v. Hapgood, L. R. 1 C. C. R. 221; R. v. Wyatt, 39 L. J. (M. C.) 83, S. C.
(4) 1 East P. C. 434.
(5) 2 Inst. 180.
(6) 1 Hale P. C. 628.
(7) 1 Hawk. P. C. Curw. ed. p. 122, s. 2.
(8) 4 Bl. Com. 210.
(9) 1 Russ. Cr. 3d. Ed. 675.
(10) Reynolds *v.* P. 41 How. Pr. 179; Brown *v.* C. 82 Va. 653.

each case be shown to the jury, who, weighing this evidence with the rest, will find as of fact whether or not the woman consented. But the question seems commonly to be treated by the courts as a question of law, and they often lay it down that the resistance must be to the extent of the woman's ability. (1) Some of the cases, both old and modern are quite too favorable to the ravishers of female virtue. Thus, where a man locked his servant girl of fourteen in a barn and had connection with her, a verdict for rape was set aside because the judge at the trial refused to direct the jury that to convict they must be satisfied she 'resisted the defendant to the extent of her ability,' though he did tell them that 'the act must have been done by force and against her will and resistance.' Said the learned judge in the Court of Appeals: '*The resistance must be up to the point of being overpowered by actual force*, or of inability, from loss of strength, longer to resist, or, from the number of persons attacking, resistance must be dangerous or absolutely useless, *or* there must be *dread or fear of death*.' (2) Various other cases state that the woman's will must oppose the act, and that any inclination favoring it is fatal to the prosecution. The latter terms are not under the ordinary facts repugnant to good doctrine. And the stronger ones just quoted might not be very objectionable in a barbarous age; but, in our age, to compel a frail woman, or girl of fourteen, to abandon her reason, and measure all her strength with a robust man, knowing the effect will be to make her present deplorable condition the more wretched, yet not to preserve her virtue,—on pain of being otherwise deemed a prostitute instead of the victim of an outrage,—is asking too much of virtue and giving too much to vice. The *text of the law*, we have seen, and, it is believed, the better judicial doctrine, requires only that the case shall be one in which the woman did not consent. Her resistance must not be a mere pretence, but in good faith." (3)

A man who gave a girl of thirteen, a quantity of intoxicating liquor to excite her, and, on her becoming drunk, violated her, while insensible to what he did, was held to have committed a rape. (4)

Ether or chloroform administered to a woman and overcoming her mental and physical nature, will have the same effect in law as administering intoxicating liquor In an Ohio case, *Lawrence, J.*, laid it down that where a woman has chloroform given her by a man, for the purpose of obtaining with her carnal intercourse to which she would not otherwise consent, then if she "had the capacity to hear, feel, and remember, and a capacity to speak and, forcibly resist, but the inclination to do so was lost, the will overcome by the action of chloroform, either operating upon the *will* faculty, or the *judgment* and *reflective* faculties (or sexual emotions), so that the mind was thereby incapable of fairly comprehending the nature and consequences of sexual intercourse, and the defendant, knowing these facts, had unlawful carnal knowledge of her, forcibly, that would be rape. And it would, in such a case, be wholly immaterial whether the entire mind was disordered and overthrown, or only such faculties thereof as are rendered incapable of having just conceptions, and drawing therefrom correct conclusions in relation to the alleged rape." (5)

Hale tells us that, in his time, rape was a felony by statute and that it "was anciently punished by loss of life But in process of time that punishment seemed too hard; but the truth is, a severe punishment succeeded in place thereof, namely, castration and the loss of the eyes, as appears by Bracton (who wrote in the time of Henry III), lib. 3, c. 28. But, then, though the offender was convict at the King's suit, the woman that was ravished, if single, might, if she pleased, redeem him from the execution, if she elected him for her husband, and the offender consented thereto." (6)

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(1) Anderson *v.* S. 104 Ind. 467; Oleson *v.* S. 11 Neb. 276, 38 Am. R. 366.
(2) P. *v.* Dohring, 59 N. Y. 374, 382, 17 Am. R. 349.
(3) Reg. v. Rudland, 4 F. & F. 495. See 2 Bish New Cr, L. Com. s. 1123.
(4) Reg. v. Camplin, 1 Den. C. C. 89; 1 Car & K. 746.
(5) S. v. Green, Whart & St. Med. Jur. 2 Ed. s. 459; 2 Bish. New Cr. L. Com. s. 1126.
(6) 1 Hale P. C. 626, 627.

Under the Roman law rape,—*raptus mulierum*,—was punished with death and confiscation of goods It is said to be the general opinion of civilians that under the Roman law the offence might be committed, not only by forcible connection with a woman against her will, but by carrying off her person from her friends with a view to debauch her. (1)

As Lord Hale has said, rape is a most detestable crime and should be severely punished ; but it is a crime of such a nature that an accusation can be easily made and is hard to prove, but it is still harder to be defended by a person accused of it, though he be never so innocent. (2)

At a recent Assizes in Warwickshire, an English judge, (Baron Huddleston), made some rather startling remarks on a similar subject.

The learned judge said there were two criminal charges in the calendar, made under a recent act of parliament, which had given great trouble and anxiety to those entrusted with the administration of justice. He meant the Criminal Law Amendment Act, which the legislature, prompted by many excellent persons, with the best intentions, passed for the purpose of preventing outrages and crimes upon women and children. No doubt it was most desirable that severe punishment should follow upon those who were guilty of the horrible crime of immorality with little children, but he ventured to express his great doubt—a doubt arising from an experience of courts of justice of nearly fifty years, a doubt fortified by an experience as a judge twelve years—whether it was to the advantage of the public to afford greater facilities for charges of a particular sort which were made by *adult* females against men. He believed he was giving the experience of his learned brothers when he said that *the majority of these charges were untrue.* Some were put forward by women for the purpose of shielding their own shame, sometimes for the purpose of extorting money, sometimes even, as he had known happen, by women for the mere purpose of getting their expenses paid and a trip to the assize town, sometimes from no conceivable motive whatever. He had in his recollection three cases in that court in which charges were brought by women against men, in which it was proved without doubt that all those three cases were utterly false and without the slightest foundation. In one of those instances a man was convicted and sentenced to five years' penal servitude, but circumstances appeared in the course of the case which seemed to him to require investigation. Investigation took place, and the result was that the accused was liberated, but not before having been several months in prison. Such instances taught them that, in these cases, men wanted protection rather than women. He pointed out that it was criminal to be unduly intimate with a girl under sixteen years of age, and remarked that this part of the act gave rise to charges of an extraordinary character. Calendars were full of them almost at every Assize. He referred to a case at Exeter in which men were charged with immorality with girls under sixteen, *but who looked quite thirty.* (3)

268. Attempt to commit rape.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who attempts to commit rape.

269. Defiling 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.

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(1) Mackenzie Rom. L. 3 Ed. 362.
(2) 1 Hale 634.
(3) 13 Cr. L. Mag. 372.

270. Every one who attempts to have unlawful carnal knowledge of any girl under the age of fourteen years is guilty of an indictable offence and liable to two years' imprisonment, and to be whipped. 53 V., c. 37, s. 12.

See article 685, *post*, and the *Canada Evidence Act* 1893, sec. 25, *post*, as to evidence of children of tender years.

Upon a trial for either of these offences, the jury may, under article 713, if the evidence points to that conclusion, return a verdict of guilty of an indecent assault, or common assault.

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.

By article 219 a child only becomes a human being when it has completely proceeded, *in a living state*, from the body of its mother; and it is not homicide to kill a child which becomes extinct before it has so become a human being. So, that, article 271 will meet the case of any wilful and unlawful killing of a child which, in consequence of the injuries inflicted upon it, becomes extinct either while it is still in the womb or while it is proceeding but has not yet completely proceeded from its mother's body.

See articles 219, and 239, *ante*, and comments thereunder.

See, also, remarks on sub-section 2 of this article, *post*, p. 191.

ABORTION.

272. Using means to procure abortion.—Every one is guilty of an indictable offence and liable to imprisonment for life who, with intent to procure the miscarriage of any woman, whether she is or is not with child, unlawfully *administers to* her or *causes to be taken by* her any drug or other noxious thing, or unlawfully uses any instrument or other means whatsoever with the like intent. R.S.C., c. 162, s. 47.

273. Woman using means to procure her own abortion.—Every woman is guilty of an indictable offence and liable to seven years' imprisonment who, whether with child or not, unlawfully administers to herself or permits to be administered to her any drug or other noxious thing, or unlawfully uses on herself or permits to be used on her any instrument or other means whatsoever with intent to procure miscarriage. R.S.C., c. 162, s. 47.

274. Supplying means to procure abortion.—Every one is guilty of an indictable offence and liable to two years' imprisonment who unlawfully supplies or procures any drug or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure

the miscarriage of any woman, whether she is or is not with child. R.S.C., c. 162, s. 48.

Where the prisoner gave a woman a drug for the purpose of procuring an abortion, and she took it for that purpose, in the prisoner's absence, this was held to be a causing of it to be taken. (1)

The drug or other thing administered must be, either in its nature, or by reason of the quantity, noxious; and it would not be sufficient if, not being actually noxious, in itself, it was merely imagined by the defendant that it would have the effect intended. (2) But, if the drug administered actually produces mis-carriage,—and there be no other evidence of its nature,—this, in itself, is sufficient evidence of its being noxious. (3)

Where the drug is not noxious in itself and quite innoxious and even useful when administered in small quantities, yet if the quantity administered by the defendant is noxious, that makes the drug so administered a noxious thing. (4)

On the other hand, if the drug is such that when administered in large quantities it is noxious, yet, if in the quantity administered by the defendant, it is innoxious, he will not be guilty of administering a noxious thing. (5)

In a case where the instrument alleged to have been used to procure an abortion was a quill, which, by its nature, might have been used for an innocent purpose, evidence was allowed to be adduced, in order to prove the intent, showing that the prisoner had, at other times, caused miscarriages by similar means. (6)

To constitute the offence of supplying a noxious thing, knowing that it was intended to be used to procure abortion, the thing supplied must be of a noxious character, in itself, or be noxious by virtue of the quantity in which it was supplied. (7)

It has been held that, if the drug supplied by the defendant be noxious, and be supplied with the intention of its being used to procure abortion, the offence is complete, although the woman may not have intended to use the drug, and although no one but the defendant may have intended that it should be used to procure a miscarriage; (8) and even although the woman was not, and never had been pregnant. (9)

Subsection 2 of article 271, *ante*, provides that no one shall be guilty of any offence who, to save the mother's life, causes the death of a child before or during its birth.

This is meant for the protection of medical men who, acting in good faith, in the course of their professional practice, find it necessary either to induce premature labor, so as to save both mother and child, or, in extreme cases, to kill, during or before labor, the unborn child, in order to save the life of the mother. For instance, there are cases in which, on account of certain deformities, such as what is termed, in medical parlance, an extreme narrowing of the *pelvic brim*, it may become impossible or very dangerous, even with the aid of forceps, to effect delivery at the end of the full term of gestation, and in which, a skilful and

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(1) R. v. Wilson, Dears. & B. 127; 26 L. J. (M. C.) 18; R. v. Farrow, Dears. & B. 164.
(2) R. *v.* Isaacs, L. & C. 220.
(3) R. *v* Hollis, 12 Cox 463, (C. C. R.)
(4) R. *v.* Cramp, 5 Q. B. D. 307; 49 L. J. (M. C.) 44. *See* comments under article 246, *ante*, p 170.
(5) R. v. Hennah, 13 Cox, 547.
(6) R. v. Dale, 16 Cox, 703.
(7) R. v. Cramp, and R. v. Hennah, *supra*.
(8) R. v. Hillman, L. & C. 343; 33 L. J. (M. C.) 60.
(9) R. v. Titley, 14 Cox, 502.

careful medical practitioner may, by inducing premature birth, at seven months, bring forth the child, sometimes alive, with perfect safety to the mother. Medical statistics appear to show that a very small proportion of women die under the operations necessary to induce these premature births, and that many of the children, thus prematurely born, live. One M. Tiguera is mentioned as having collected 280 cases, in which only six proved fatal to the mothers; and Dr. Hoffman is said to have collected 524 cases, in thirty four of which the operations had been repeated three, four or more times; and in 373 of these cases, 250 children were born alive and 123 dead.

The terms *miscarriage* and *abortion* are used, by medical men, to signify the expulsion of the ovum or child *before* it is *viable*; and the term *premature labor* is used by them to signify the expulsion of the child *after* it is *viable*.

Ovum is generally used to signify an early stage of infant life, before what is popularly called quickening. It is also called, *embryo*. *Fœtus* is a word used to signify the fruit of the womb from the period of quickenning until its birth: but, in the later stages, during the seventh, eighth, and ninth months, it is more usual to speak of it as the *child*.

An *embryo* of three months is usually from two to two and a half inches in length, and about an ounce and a half in weight.

A *fœtus* of four months is from five to six inches, in length, and about three ounces in weight.

A *fœtus* of five months is from six to seven inches in length, and from five to seven ounces in weight.

At six months a *fœtus* is from nine to ten inches in length, and about a pound in weight; at seven months it is from thirteen to fifteen inches long, and weighs from three to four pounds; at eight months it reaches from fourteen to sixteen inches in length, and weighs from two to five pounds; and at nine months, or at the end of the full term of gestation, the child is from seventeen to twenty one inches long, and varies from five to nine pounds in weight.

For a child to be *viable*, in other words, to be capable of living after its birth, it must have attained a certain degree of development and growth. Seven months' children and those born at eight months are sufficiently common; but there are records of some remarkable cases, (not necessary to be particularized here), of infants born at much earlier stages of gestation.

The practical conclusions, arrived at by medical scientists, as to a child's viability, are as follows:

1. Children born at seven months, eight months, and intermediate periods up to term, not only may live, but constantly do so.
2. Life is also possible, though less probable, when the birth takes place at six to seven months. A few survive.
3. Children have been born alive as early as four to five months. At the latter age, or a few days more, one or two have survived.
4. Although, from the first moment of impregnation, the ovum is *alive*, yet, previous to the fifth month there is no possibility (so far as we know) of their being reared, and before six or seven months, it is very improbable. (1)

The Scotch law allows six lunar months, or 168 days, for a child to be both viable and legitimate. The Parliament of Paris, in the case of Cardinal Richelieu, decided "that the *fœtus* at five months possessed that capability of living to the ordinary period of human existence which the law of France required for establishing its title to inheritance." The Code Napoleon mentions 180 days, or six calendar months.

As, from a medical point of view, the average period, at which a *fœtus* becomes viable, is six months, the term *abortion* is, medically, usually limited to

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(1) Wood. and T. For. Med. 749.

procuring the expulsion of the contents of the womb, *before the sixth month of gestation*. But the law makes no such distinction of time.

If, in the attempt to procure abortion, or after and in consequence of the abortion being effected, the woman dies, the crime is usually considered as murder, although the accused may not have meant to destroy life. He would now come within the definition of murder contained in article 227*d*, *ante*. The law on the subject was laid down by Baron Bramwell in Stadtmühler's case, Liverpool, Winter assizes, 1858, whose remarks are reported as follows:—"If a man, for an unlawful purpose, used a dangerous instrument, or medicine, or other means, and thereby death ensued, that was murder, although he might not have intended to cause death, although the person dead might have consented to the act which terminated in death, and although possibly he might very much regret the termination that had taken place contrary to his hopes and expectations. This was wilful murder. The learned counsel for the defence had thrown on the judge the task of saying whether the case could be reduced to manslaughter. There was such a possibility, but to adopt it would, he thought, be to run counter to the evidence given. If the jury should be of opinion that the prisoner used the instrument not with any intention to destroy life, and that the instrument was not a dangerous one, though he used it for an unlawful purpose, that would reduce the crime to manslaughter. He really did not think that they could come to any other conclusion than that the instrument was a dangerous one, if at all used. Then, if it were so used by the prisoner, the case was one of murder; and there was nothing for the case but a verdict either of murder or of acquittal." (1)

Means of procuring abortion.—Women have been known to employ some of the most extraordinary means to procure abortion: such as violently rolling down hill, throwing themselves downstairs, or out of window, submitting themselves to be laced with extreme tightness, or even to be trampled on and kicked on the abdomen. Tardieu mentions the following case:—

In the Assize Court of the Loire-Inférieure, it was proved that a peasant, who had seduced his servant, and wished to make her abort, mounted on a strong horse, and put the girl on the same horse, then galloped wildly hither and thither, throwing her down on the ground whilst in full gallop, and this repeatedly. Having tried this twice without success he conceived the horrible idea of applying to her stomach bread just taken from a very hot oven. This means failed like the former, and the poor victim gave birth to a living and well-formed child at term. (2)

Amongst the drugs generally used to procure abortion might be included almost every known purgative, and almost every drug or herb which has medicinal properties.

The following commonly used substances,—squills, sarsaparilla, guaiacum, aloes, balm, horehound, camomile, wormwood, saffron, borax, mugwort, and juniper, are considered by many medical authorities to be perfectly harmless in this respect; although some have considered that aloes, wormwood, borax, and mugwort possess properties which may be indirectly effective in procuring abortion.

It seems that such poisons as arsenic, mercury, sulphate of copper, and cantharides have no special action on the *uterus*, and that to produce any effect for purposes of abortion they would have to be given in doses almost necessarily fatal.

There is some medical evidence that *iodide of potassium, yew, penny-royal* and *oil of rue* will cause abortion, and the evidence is still stronger in regard to the efficacy of *savine* and *ergot of rye*.

Amongst the mechanical instruments and contrivances which have been used in procuring abortion may be mentioned pointed sticks and wooden skewers, syringes, catheters, guarded stillettes, forceps, long knitting needles, and steel

(1) Wood. & T. For. Med. 761, 762, 745, *et seq.*
(2) Tardieu Etude Med. Leg. sur l'Avortement, p. 27.

claws, the latter being worn on the fingers, for the purpose, as it seems, of penetrating the membranes or tearing the embryo. (1)

Proof.—It was held in an American abortion case that, any declarations or acts of the defendant tending to show his intention and purpose to produce the abortion are admissible, whether such acts and declarations were prior or subsequent to the particular act charged in the indictment; that the defendant made a subsequent attempt to accomplish the same purpose by different means is admissible to show with what purpose and intent he made the attempt charged in the indictment as well as to corroborate the evidence of the first attempt; and that a letter written by the defendant, containing ambiguous language, may be received in evidence against him, and its language explained by parol, when it relates to the question at issue.

The defendant in the case had been convicted in the Circuit Court of Baltimore county, upon an indictment charging him, with furnishing Rachael Taylor, a pregnant woman, with certain drugs and medecines and with advising and soliciting her to take them for the purpose of producing an abortion.

After the state had proved, by the woman Taylor, that the defendant had furnished her with some pills and drops and advised her to take them, saying that they would destroy the child of which she was pregnant, the witness was asked if the defendant had proposed to her any other means of producing the abortion; and she answered, that he had taken her to a doctor in Baltimore and told her to go through an operation to destroy the unborn child, but that she refused to submit to such operation. To this question and answer the defendant objected and on the court allowing them the defendant excepted.

The State then put in evidence a letter, from the prisoner to the woman Taylor, in which he said, "I made you a fair proposition, which if you had not spurned we would have been the same as ever," &c., and asked her what was the proposition referred to, upon which she answeared that it was a proposition by the defendant that she should be operated upon. The defendant also objected to this question and answer, and, on same being allowed, he excepted.

Upon these two exceptions the case came before the Maryland Court of appeals; and, in rendering judgment in that Court, Stone, J. said, as to the first exception;

"The *gravamen* of the offence charged against the accused was his purpose and intention to produce an abortion upon the body of Rachael A Taylor, and he is charged with endeavoring to effect that purpose by furnishing her with drugs, and advising her to take them. Any declarations or acts of the defendant tending to show his intention and purpose to produce such abortion are admissible, whether made prior or subsequent to the particular act charged in the indictment. That he made a subsequent attempt to accomplish the same purpose by different means, is admissible to show with what purpose and intent he made the attempt charged in the indictment, as well as to corroborate the evidence of the first attempt. In the case of King v. Ellis, (2) the prisoner, a shopman, was indicted for robbing his employer's money-drawer of a particular sum of money on a particular day. At the trial, evidence was admitted that the prisoner had robbed the drawer at other times Upon review, the court, Bayley, J., delivering the opinion, said: 'Generally speaking, it is not competent to a prosecutor to prove a man guilty of one felony by proving him guilty of another unconnected felony; but where several felonies are connected together and form part of one entire transaction, then the one is evidence of the character of the other.' Holroyd said in the same case: 'Upon an indictment for robbing the prosecutor of a coat, the robbery having been committed by the prisoner threatening to charge the prosecutor with an unnatural crime, I received evidence of a second ineffectual attempt to obtain a one pound note from the prosecutor by similar threats, but reserved the point for the judges, and they were of opinion that the evidence was admissible to show that the prisoner was guilty of the former transaction.' The proof of a second attempt to accomplish

(1) Wood. & T. For. Med. 753, *et seq.*
(2) R. v. Ellis, 6 B. & C., 145.

the same purpose is, therefore, we think, clearly admissible to prove the purpose in the former attempt, and the ruling of the court on the first exception must be affirmed."

In reference to the second exception the learned judge said :—

"Declarations of the accused, as to the crime with which he is charged, if voluntary, are always admissible against him. This letter is nothing but a declaration made by the prisoner. It refers to a proposition, but does not say what it was; and it was entirely competent to shew by parol, what the proposition was, if it applied to the case. The ruling on this second exception, also, must therefore be affirmed." (1)

In an Iowa case, where the testimony of the woman upon whom the abortion was attempted was to the effect that she was with child by the accused, and that, upon telling him of her condition, he gave her two bottles of "Dr. Lyon's Spanish Drops," which he said "would be sure to bring her all right," and which, when she took it, made her "dizzy" and sick, and where the accused, when testifying in his own behalf, admitted having had illicit intercourse with the woman, who was a servant in his family, and the giving of the medicine, but claimed that he did not know that she was pregnant, that he gave it to her only to restore regular menstruation,—it was held that the evidence was sufficient to support a conviction. (2)

In the State of Wisconsin, (whose laws make it manslaughter, in case of the death of either child or mother), to administer to a pregnant woman any drug or other substance, or to employ any instrument or other means, with intent thereby to destroy the child, unless the operation is necessary to preserve the life of the mother, or has been advised by two physicians to be necessary for that purpose, it was held, that, the fact that one of the defendants, who was a physician, thought that the operation was necessary to save the life of the mother, was no defence where the evidence showed that it was in fact unnecessary; that, as the evidence showed that defendant operated with a knife on the womb of a healthy woman nineteen years old, so that she was delivered of a partly grown child, and was then attacked with peritonitis, of which she died, an inference that the operation was not necessary to save her life was warranted: that the fact that the woman had threatened to commit suicide unless she could be relieved of the child with which she was pregnant, did not show such a necessity to perform the operation in order to save her life as was contemplated by the statute; that an instruction, that defendants must show beyond a reasonable doubt that they had the advice of two physicians that the operation was necessary to save the life of the mother, is harmless error, where defendants have introduced no evidence whatever that they had such advice, this being a fact peculiarly within their knowledge, whose non-existence it is practically impossible for the state to show; and that, the defendants being husband and wife, evidence that the wife, in the absence of the husband, offered to produce the abortion for the deceased, and stated that she had helped other women out of similar trouble, is admissible to show that she acted without the coercion of her husband.

The facts as established in evidence were, briefly stated, as follows: that Minnie Beardsley, being pregnant, applied to Dr. Hatchard to procure an abortion upon her; that he administered medicine to her, and operated upon her womb three times with a long sharp instrument for that purpose; that she was a healthy woman, nineteen years of age; that Mrs. Hatchard had previously offered to perform the operation, and voluntarily assisted her husband in doing so each time; that a few days after the last operation Minnie was delivered of a partly grown female child; that she was immediately attacked with inflammation of the bowels or peritonitis, and died thereof the next day succeeding her delivery, and that her disease was caused by such operations upon her person. (3)

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(1) Lamb v. State, S. C., 9 East. Rep. 283 : 9 Cr. L. Mag. 338.
(2) State v. Montgomery, 33 N. W. Rep. 143 ; 9 Cr. L. Mag. 712.
(3) Hatchard v. State (Wis.), 48 N. W. Rep. 380 ; 13 Cr. L. Mag. 566, 620.

PART XXII

OFFENCES AGAINST CONJUGAL AND PARENTAL RIGHTS—BIGAMY—ABDUCTION.

BIGAMY.

275. Definition.—Bigamy is—

(*a.*) the act of a person who, being married, goes through a form of marriage with any other person *in any part of the world;* or

(*b.*) the act of a person who goes through a form of marriage *in any part of the world* with any person whom he or she knows to be married; or

(*c.*) the act of a person who goes through a form of marriage with more than one person simultaneously or on the same day. R.S.C., c. 27, s. 10.

2. A "form of marriage" is any form either recognized as a valid form by the law of the place where it is gone through, or, though not so recognized, is such that a marriage celebrated there in that form is recognized as binding by the law of the place where the offender is tried. Every form shall for the purpose of this section be valid, notwithstanding any act or default of the person charged with bigamy, if it is otherwise a valid form. The fact that the parties would, if unmarried, have been incompetent to contract marriage shall be no defence upon a prosecution for bigamy.

3. No one commits bigamy by going through a form of marriage—

(*a.*) *if he or she* in good faith and on reasonable grounds *believes his wife or her husband to be dead;* or

(*b.*) if his wife or her husband has been continually absent for seven years then last past and he or she is not proved to have known that his wife or her husband was alive at any time during those seven years; or

(*c.*) if he or she has been divorced from the bond of first marriage; or

(*d.*) if the former marriage has been declared void by a court of competent jurisdiction. R.S.C., c. 161, s. 4.

4. No person shall be liable to be convicted of bigamy in respect of having gone through a form of marriage in a place not in Canada, unless such person, *being a British subject resident in Canada*, leaves Canada with intent to go through such form of marriage.

276. Punishment.—Every one who commits bigamy is guilty of an indictable offence and liable to seven years' imprisonment.

2. Every 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.

The definition of bigamy as contained in the foregoing article, 275, differs, in at least one important point, from the definition of the offence as contained in the English Draft Code, in this respect, namely, that, while, on the one hand, the above article expressly declares that, "No one commits bigamy by going through a form of marriage, *if he or she, in good faith and on reasonable grounds, believes his wife or her husband to be dead*," the English Draft Code contains a special proviso that "unless there be such absence as aforesaid (that is to say, a continual absence from the first wife or husband of seven years), *a belief on any grounds whatever, that a wife or husband is dead shall be no defence* to a charge of bigamy, *if such wife or husband was in fact alive*, when the form of marriage was gone through."

The remarks of the Royal Commissioners on the subject of bigamy are as follows:

"The existing statute as to bigamy is so worded as to have given rise to a difference of judicial opinion as to whether it does or does not, from motives of policy, make it a crime to marry again during the life of the husband or wife, though in the *bonâ fide* and reasonable belief that the first husband or wife was dead, unless seven years had elapsed since he or she was last heard of. We have thought it important that the law should be certain, and have accordingly framed the clause so as to leave no doubt what the law would be. In doing so we have adopted the construction which has been more generally put on the existing statute.

"No doubt the conviction of a man marrying again within the seven years, under the honest belief that his wife was dead, may be regarded as a hard case; but the hardship may, at present, be mitigated by the infliction of a nominal punishment, and will be capable of still further mitigation if the Draft Code becomes law. On the other hand, care must be taken not to give encouragement to bigamous marriages by relaxing the rule that a man marrying within the prescribed seven years does so at his peril.

"Among the suggestions furnished to us was one that clause 216 (1) might subject a Hindoo coming to England to a prosecution for having a plurality of wives in his own country. So far as this point is concerned, the clause is taken from the Act of 1861, which re-enacted in terms the Act of 1828. We have merely altered the wording so as to make it harmonize with the other sections of the Draft Code by changing 'elsewhere than in England or Ireland,' into any part of the world.' During the half century which has elapsed, since the first of these statutes was passed, no attempt has ever been made to apply them to such a case as the one suggested, for the reason we presume, that 'marriage,' in these statutes, means the union, for life, of one man with one woman, to the exclusion of all others, as is well expressed by Lord Penzance in Hyde v. Hyde. (2) Whatever may be the ceremony by which a polygamist adopts a woman, as one of his wives, the relation which it creates is essentially different from that which our criminal legislation contemplated by the word 'marriage.'"

Proof must be made of the two marriages, and that at the time of the second marriage the first husband or first wife, as the case may be, was living. It is immaterial whether the first marriage was celebrated here or abroad (3). If celebrated abroad it may be proved by any person present at it; and circumstances should be proved from which the jury may presume that it was a valid marriage according to the laws of the country in which it was celebrated, and, now, under section 4 of the *Canada Evidence Act*, 1893, *post*, the first wife will be a competent witness.

Proof that the first marriage was celebrated by a person appearing and officiating as a priest, and that it was understood by the parties to be the marriage ceremony, according to the rites and customs of the foreign country, would

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(1) Clause 216 of the English Draft Code is the clause defining bigamy.
(2) Hyde v. Hyde, 35 L. J. (Prob.) 57, .
(3) 1 Hale, 692.

be sufficient presumptive evidence of it, so as to throw upon the defendant the *onus* of impugning its validity. (1)

It was however, *held* by Lush, J., that in an indictment for bigamy every thing must be proved most strictly, and that, therefore, evidence of the first marriage in Scotland, by a Roman Catholic priest who had many times previously performed similar ceremonies there, would not suffice, without proof of the law of Scotland, as to such marriage. (2) And in another case it was held that a valid marriage in Scotland could not be proved except by the evidence of a person having a knowledge of the law of Scotland as to marriages. (3)

If the first marriage was celebrated in this country it may be proved by the production of the register of the marriage from the proper custody, that is from the Church itself or from the custody of the priest, clergyman or other officiating minister; or by a duly certified copy thereof or extract therefrom, together with some proof, either direct or presumptive, of the identity of the parties. (4)

Section 13 of the *Canada Evidence Act* 1893, *post*, provides for proof of this kind in the following terms:—

"Where a book or other document is of so public a nature as to be admissible in evidence on its mere production from the proper custody, and no other statute exists which renders its contents provable by means of a copy, a copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before a person having by law, or by consent of parties, authority to hear, receive and examine evidence, provided it is proved that it is a copy or extract purporting to be certified to be true by the officer to whose custody the original has been entrusted." And section 14 of the *Canada Evidence Act* further provides that "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."

Proof that the marriage took place in a dissenting chapel, in the presence of the registrar, that the entry in the registrar's book was signed by a person who proved the fact of the marriage, as a witness to the marriage, and that the parties afterwards cohabited for some years, was held sufficient *prima facie* proof that the chapel was duly registered as a place in which marriages might be lawfully solemnized: (5) and where the marriage was solemnized in a dissenting chapel by a dissenting minister in the presence of the registrar of the district and two witnesses, and the certificate was produced, it was held to be unnecessary to prove that the chapel was registered (6) In another case it was proved that the marriage was solemnized in a building a few yards from the parish church, while the church was under repair and it was further proved that divine service had several times been performed in this building. It was, therefore, held that the building must be presumed to have been licensed, and that therefore the marriage might be properly solemnized there (7)

Under the old English Marriage License Laws, it was at one time held, that, if the marriage were by license, and if either of the parties were a minor at the time, it was necessary to prove that the marriage was solemnized with the consent of the parents or guardian of the minor; although subsequent countenance from the parents or guardian, or other similar circumstances, afforded ground for presuming the necessary consent (8). Later legislation however had

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(1) See R. v. Inhabitants of Brampton, 10 East, 282.
(2) R. v. Savage, 13 Cox, 178.
(3) R. v. Povey, Dears 32; 22 L. J. (M. C.) 19.
(4) R. v. Hawes, 1 Den. 270; R. v. Tilson, 1 F. & F. 54.
(5) R. v. Manwaring, Dears & B. 132; 26 L. J. (M. C.) 10.
(6) R. v. Cradock, 3 F. & F. 837.
(7) R. v. Cresswell, Q. B. D. 446: 45 L. J. (M. C.) 77.
(8) R. v. Butler, R. & R. 61; R. v. Morton R. & R. 19 *n.*; R. v. James, R. & R. 17; R. v. Butler, R. & R. 61 *n.*

the effect of rendering it unnecessary, in bigamy cases, to prove the consent of the parents or the guardian to the first marriage of a minor. (1)

It was originally the intention of the English Marriage Act that the banns should be published in the true names of the parties, and, if the banns were published in names totally different from those which the parties used or by which they were known, it used to have the effect of invalidating the marriage, whether the misdescription was by accident or from design and whether it was fraudulent or not; but, now, under the English Marriage laws, in order to invalidate a marriage for want of due publication of banns the misdescription in the banns must be with the knowledge of both parties. (2)

By the Imperial statute 6 and 7 W. IV. c. 85, sec. 42, it was enacted "that if any persons shall knowingly and wilfully intermarry under the provisions of this Act, without due notice to the superintendent-registrar, the marriage of such persons shall be null and void;" and it was held that, to render a marriage invalid under that act, it must be with a knowledge by both parties, that no due notice had been given; and therefore where one of the parties,—in disregard of a clause of the act, which requires the name and surname of each of the parties intending marriage to be stated in the notice,—gave a notice stating therein a false christian name, but it did not appear that that was done with the knowledge of the other party, the marriage was held valid. (3)

Where the parties were married in Ireland with the ceremonies necessary to make a marriage of Roman Catholics valid, the man and the woman both declaring themselves to be Roman Catholics, it was held that the man could not, on an indictment for bigamy, set up his alleged protestantism to defeat such marriage. (4)

Athough, in bigamy cases, a first valid marriage must be proved it appears that it is not essential, in order to establish it, that proof should be made of the license, or of the publication of the banns, &c.; but that the fact of the marriage having been validly solemnized may be proved by some person who was actually present, and saw the ceremony performed (5). Or, the prisoner's own admission of a prior marriage may be relied on as good evidence to shew that it was lawfully solemnized. (6)

The marriage of Jews is by a written contract, which is afterwards solemnly ratified in the synagogue: and it has been held in England that in order to prove such a marriage, it is not sufficient to prove the religious ceremony by the parol testimony of some person who was present, but that the contract must also be proved. (7)

Proof of a first marriage which is merely *voidable* is sufficient, in a prosecution for bigamy. (8) Thus, a marriage contracted in Ireland by a minor, without consent,—such a marriage being, by the Irish Marriage Act, voidable only within a year,—will support a conviction for bigamy, if such first marriage has not been vacated. (9)

But it is otherwise if the first marriage be not merely voidable but actually *void*. As, for instance, if a woman marry A., and in A's lifetime, marry B., and then, after A's death, and whilst B. is alive, she also marry C., she cannot be

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(1) R. v. Birmingham, 8 B. & C. 29.
(2) R. v. Inhabitants of Wroxton, 4 B. and Ad. 640.
(3) R. v. Rea, 41 L. J. (M. C.) 91; L. R., 1 C. C. R. 365.
(4) R. v. Orgill, 9 C. & P. 80
(5) R. v. Allison, R. & R. 109; R. v. Manwaring, Dears. & B. 132; 26 L. J. (M. C.) 10.
(6) R. v. Newton, 2 M. & Rob. 503; R. v. Simmonsto, 1 C. & K. 164. But see R. v. Savage, *supra*.
(7) Hern. v. Noel 1 Camp. 61; Arch. Cr. Pl. & Ev. 302.
(8) 3 Inst. 88.
(9) R. v. Jacobs, 2 Moo. C. C. 140.

indicted for bigamy, in marrying C., because her marriage with B was a mere nullity (1)

So, if a man marry A., and, in the lifetime of A., he marry B., and, afterwards, in the lifetime of both A. and B., he marry C., he cannot be prosecuted for bigamy, on an indictment charging him with that offence in marrying C. during the lifetime of his wife B.; because the marriage with B. was void. (2) The indictment, to be good, would have to charge him with committing bigamy in marrying C., during the lifetime of A.

If a boy under fourteen, or a girl under twelve contract matrimony, it is void, unless both parties to such a marriage consent to and confirm it after the one who was under the age of consent arrives at the age of consent. (3)

Although the first marriage must be proved to have been a valid one, this is not necessary with regard to the second or bigamous marriage. The above article 275 makes it bigamy for any person, being married, *to go through a form of marriage* with any other person; and sub-section 2 declares that "every form of marriage shall, for the purpose of this section, be valid, notwithstanding any act or default of the person charged with bigamy, if it be otherwise a valid form." So that, after proving the defendant's first marriage, it will be sufficient to make proof of his having gone through a second marriage ceremony with another woman, and it will be no defence to an indictment for bigamy to shew that the second marriage was not legal but was void, by reason, for instance, of the parties to it being relations within the prohibited degrees of consanguinity or affinity. (4)

Where, therefore, in the second marriage, the defendant assumed a fictitious name, the offence was, never the less, held complete. (5)

Upon an indictment for bigamy in marrying Anna T., the defendant's first wife being alive, it appeared that the second wife's name was not Anna but Susanna, but the defendant himself had written her name as *Anna* in the note for publication of banns, and he had signed the register in which she was so called; and it was held that, although the woman's name might not be Anna, the defendant could not defend himself on the ground that he did not marry Anna T. but Susanna. (6)

Where the second wife was married by the name of Eliza Thick, which name she had purposely assumed, when the banns were published, so that she should not be known to be the person intended, (her name being Eliza Brown), *Gurney* B. held this to be no answer to the charge of bigamy. (7)

A man, who, being married, married another woman, and gave a false name, in his notice to the registrar, without it appearing that the woman knew of it,—was found guilty of bigamy. (8)

The English Court of Crown Cases Reserved has recently, in a case reserved for the consideration of all the judges, laid down the following general rule, namely that where a person already bound by an existing marriage, goes through a form of marriage known to and recognised by the law as capable of producing a valid marriage, for the purpose of a pretended and fictitious marriage, the case is none the less within the statute relating to bigamy, by reason of any special circumstances, which independently of the bigamous character of the marriage, may constitute a legal disability in the particular parties or make the form of

(1) 1 Hale, 693.
(2) R. v. Willshire, L. R., 6 Q. B. D. 366.
(3) Co. Lit. 79: R. v. Gordon, R. & R. 48.
(4) R. v. Allison, R. & R. 109.
(5) R. v. Brawn, 1 C. & K. 144.
(6) R. v. Edwards, R. & R. 283.
(7) R. v. Penson, 5 C. & P. 412.
(8) R. v. Rea, L. R. 1 C. C. R. 365; 41 L. J. (M. C.) 92; Arch. Cr. Pl. & Ev. 21 Ed. 1022.

marriage resorted to specially inapplicable to their individual case. (1) So that, where A., a married man, whose wife was living, went though the marriage ceremony with another woman related to him within the prohibited degrees of affinity, so that the second marriage, even if not bigamous, would have been void, he was held guilty of bigamy. (2)

The case of R v. Fanning, (3)—in which the Irish Court of Criminal Appeal held that to constitute the offence of bigamy the second marriage must have been one which, but for the existence of the previous marriage, would have been a valid marriage,—was fully considered by the English Court of Criminal Appeal, in the case of R. v. Allen, *supra*, and disapproved.

It will be noticed that subsection 2 of article 275 of our Code now expressly provides that, "the fact that the parties would, if unmarried have been incompetent to contract marriage shall be no defence upon a prosecution for bigamy."

The prosecution must prove that the first wife was living when the second marriage was solemnized. This may be done by some person acquainted with the first wife and who saw her at the time of the second marriage or afterwards. The fact that the first wife was living at a period *antecedent* to the time of the second marriage may or may not afford a reasonable inference that she was living at the time of the second marriage. For instance, if it were proved that she was living and in good health on the day preceding the second marriage, the inference would be very strong that she was living on the day of the second marriage ; and the jury would probably find that she was so. If on the other hand, it were proved that the first wife was in a dying condition on the day preceding the second marriage, and nothing further were proved, the jury would probably decline to draw the inference that she was still living on the day of the second marriage.

The question, therefore, is one entirely for the jury ; and the law makes no presumption either way. (4) Therefore where on the trial of a woman for bigamy it was proved that the second marriage took place in 1847, but that the first husband had been last seen alive in 1843, and the judge directed the jury that there being no circumstances leading to any reasonable inference that he had died, he *must* be presumed to have been alive at the time of the second marriage, this direction was held to be erroneous, and the man's conviction was quashed. (5)

The principal defences available to the defendant to a prosecution for bigamy are: 1, Belief, on reasonable grounds, that the first husband or the first wife, as the case may be, is dead; 2. Continual absence of the first wife or husband for seven years; 3. Divorce from the bond of the first marriage, and 4. That the first marriage has been declared void by a court of competent jurisdiction.

On the subject of bigamy there are some differences between the Imperial Statute and our Code.

The Imperial Act (24 and 25 Vic., c. 100, s. 57), is as follows :—

"Whosoever, being married, shall marry any other person, during the life of the former husband or wife, whether the second marriage shall take place in England or *elsewhere* shall be guilty of felony, and, being convicted thereof, shall be liable to be kept in penal servitude for any term not exceeding seven years: * * * * Provided that nothing in this section contained shall extend to any second marriage contracted elsewhere 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 been *known by*

(1) R. v. Allen, L. R. 1 C. C. R. 376 ; 41 L. J. (M. C.) 101.
(2) R. v. Allen, L. R., 1 C. C. R., 367 ; 41 L. J. (M. C.) 97.
(3) R. v. Fanning, 17 Ir. C. L. R 289 ; 10 Cox, 411.
(4) R. v. Lumley, L. R., 1 C. C. R. 196 ; 38 L. J. (M. C.) 86.
(5) Id. See also, R. v. Willshire, ante, p. 200.

such person to be living within that time, or to any person who, at the time of such second marriage shall have been divorced from the bond of the first marriage, or whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction."

It will be seen that the main difference between our law, as it now stands, and the law of England is that the Imperial Statute does not contain the clause contained in the above article, 275, declaring that, no one commits bigamy by going through a form of marriage, "if he or she, in good faith and on reasonable grounds, *believes* his wife or her husband to be dead."

There is also some difference between the wording of the two enactments, in regard to the seven years' absence. The English statute has the words, "and shall not have been known by such person to be living within that time," while the wording of the clause in our law is "and he or she *is not proved* to have known that his wife or her husband was alive at any time during those seven years."

This, however, is merely a verbal differenee. The effect of the two seems to be the same; for in England, as well as in Canada, under the law as expressed in the 16 R. S. C., s. 4, and previous Canadian statutes, worded like the Imperial statute, it has been held that, when, on a trial for bigamy, absence for seven years is proved, it is, then, for the prosecution to shew that the prisoner knew his wife to be alive at some time during the seven years, and that on the prosecution failing to do so, the prisoner is entitled to an acquittal. (1)

In another case, where it was proved that the accused's first husband had been absent from her for more than seven years, the jury found that they had no evidence that at the time of her second marriage, she knew him to be alive, although she had the means of acquiring knowledge of that fact had she chosen to make use of such means; and it was held that upon this finding the conviction could not be supported. (2).

Where the defendant's first wife had left him sixteen years, and it was proved by the second wife that she had known him for nine years living as a single man, and had never heard of the first wife who it appeared had been living seventeen miles from where the defendant, (a poor laboring man), resided, he was held entitled to an acquittal. (3)

With regard to the seven years absence clause, there were for a time a number of conflicting decisions rendered in England, it being held in a few cases, by some of the judges, (including Baron Martin and Baron Cleasby), that, although seven years had not passed since the first marriage, yet if the prisoner reasonably believed that his first wife was dead he was entitled to an acquittal: (4) while others held that under the terms of the 24-25 V., c. 100, s. 57, already quoted, *ante*, p. 201, unless seven years had elapsed between the first and second marriages, it was no defence for the prisoner to show that he had reasonable grounds for believing that his first wife was dead. This was the holding in a number of cases; (5) and in their Report on the English Draft Code which was made in 1878 the Royal Commissioners, in their remarks upon bigamy, (see extract set out at p. 197, *ante*), not only take this view of the law, but emphasize the necessity of framing the clause on this subject in such a manner as to make the law certain in this respect, in order, as they say that,—although it may be

(1) R. v. Curgerwen, L. R., 1 C. C. R. 1; 35 L. J. (M. C.) 58; R v. Heaton, 3 F. & F. 819; Arch. Cr, Pl. & Ev. 21 Ed. 1024; R. v. Pierce, 13 O R. 226; R. v. McQuiggan, 2 L. C. R. 340; R. v Fontaine, 15 L. C. J. 141; R. v. Dwyer, 27 L. C. J. 201; R. v. Debay, 3 G. & O. 540; R. v. Smith, 14 U. C. Q. B. 565; Bur. Dig. 254.

(2) R. v. Briggs, Dears. & B. 98; 26 L. J. (M C.) 7; See R. v. Dane, 1 F. & F. 323; R. v. Cross, 1 F. & F. 510.

(3) R. v. Thomas Jones, C. & Mor. 614.

(4) R. v. Turner, 9 Cox, 145; R. v. Horton, 11 Cox, 670; R. v. Moore 13 Cox, 544.

(5) R v. Gibbons, 12 Cox, 237; R. v. Bennett, 14 Cox, 45.

a hardship to convict a man of bigamy for marrying again under the honest belief that his wife was dead,—encouragement may not, on the other hand, be given to bigamous marriages by relaxing the rule that a man marrying within the prescribed limit of seven years does so at his peril.

But the whole subject has since, (in 1889), been thoroughly considered and finally settled by the English Court of Criminal Appeal in Tolson's case, in which on account of the conflicting views of individual judges, the point was reserved by Stephen, J., and it was decided by that Court composed of Lord Coleridge, C. J., and Hawkins, Stephen, ~~Cave~~, Day, Smith, Wills, Grantham, and Charles JJ., (Denman, Field, and Manisty, JJ. and Pollock and Huddleston, B.B,. dissenting), that a *bona fide* belief on reasonable grounds in the death of the husband at the time of the second marriage afforded a good defence to the indictment, although the second marriage took place within seven years of the time when the defendant last knew of her husband being alive.

In that case, the prisoner Martha Ann Tolson had been convicted, in 1888, under 24-25 Vict., c. 100, s. 57, of bigamy, in having gone through the ceremony of marriage within seven years after she had been deserted by her first husband. It appeared that the prisoner's first marriage took place in September 1880; that her first husband, Tolson, deserted her in December 1881; that she and her father, on making enquiries about him, learned, from his elder brother, that he had been lost in a vessel bound for America, which went down with all hands on board; that in January 1887, (within seven years after Tolson's departure), she, supposing herself to be a widow, went through the marriage ceremony with another man, to whom all the facts were made known; and that in December 1887, the first husband, Tolson, having returned from America, reappeared upon the scene.

Upon her trial for bigamy, Stephen J., directed the jury that according to law, a belief, in good faith and on reasonable grounds, that the husband of the prisoner was dead would not be a defence to a charge of bigamy, and, in the case, he stated that his object, in so holding, was not as an expression of his own opinion, but so as to obtain the decision of the court, in view of the conflicting decisions of single judges on the point. The jury convicted the prisoner, stating, however, in answer to a question put by the judge, that they thought that she, in good faith and on reasonable grounds believed her husband to be dead at the time of the second marriage; and the judge sentenced her to one day's imprisonment.

The following are extracts from the remarks of some of the nine judges who formed the majority of the Appeal Court, in rendering the judgement quashing the conviction, and of the other five dissenting judges.

Mr. Justice Wills said, "There is no doubt that under the circumstances the prisoner falls within the very words of the statute. She, being married, married another person during the life of her former husband, and when she did so he had not been continually absent from her for the space of seven years. But it is undoubtedly a principle of English criminal law that ordinarily speaking a crime is not committed if the mind of the person doing the act in question is innocent. 'It is a principle of natural justice and of our law,' says Lord Kenyon, C. J., 'that *actus non facit reum, nisi mens sit rea.* The intent and act must both concur to constitute the crime.' (1) The guilty intent is not necessarily that of intending the very act or thing done and prohibited by common or statute law, but it must at least be the intention to do something wrong. That intention may belong to one or other of two classes. It may be to do a wrong thing in itself, or it may be to do a thing merely prohibited by law, or both elements of intention may co-exist with respect to the same deed. There are many things prohibited by no statute,—fornication, for instance which nevertheless, no one would hesitate to call wrong; and the intention to do an act wrong in this sense at the least must as a general rule exist before the act done can be considered a crime.

(1) Fowler v. Pudgett, 7 T. R. 509, 514.

"Knowingly and intentionally to break a statute must, I think, from the judicial point of view, always be morally wrong in the absence of special circumstances applicable to the particular instance and excusing the breach of the law, as, for instance, if a municipal regulation be broken to save life or to put out a fire. But, to make it morally right, some such special matter of excuse must exist, inasmuch as the administration of justice, and, indeed, the foundations of civil society, rest upon the principle that obedience to the law, whether it be a law approved of or disapproved of by the individual, is the first duty of a citizen.

"Although *prima facie* and as a general rule there must be a mind at fault before there can be a crime, it is not an inflexible rule, and a statute may relate to such a subject-matter and may be so framed as to make an act criminal whether there has been any intention to break the law or otherwise to do wrong or not. There is a large body of municipal law in the present day which is so conceived. By-laws are constantly made regulating the width of thoroughfares, the height of buildings, the thickness of walls, and a variety of other matters necessary for the general welfare, health or convenience, and such by-laws are enforced by the sanction of penalties, and the breach of them constitutes an offence and is a criminal matter. In such cases it would, generally speaking, be no answer to proceedings for infringement of the by-law that the person committing it had *bonâ fide* made an accidental miscalculation or an erroneous measurement. The acts are properly construed as imposing the penalty when the act is done, no matter how innocently, and in such a case the substance of the enactment is, that a man shall take care that the statutory direction is obeyed, and that if he fails to do so he does it at his peril.

"Whether an enactment is to be construed in this sense or with the qualification ordinarily imported into the construction of criminal statutes, that there must be a guilty mind, must, I think, depend upon the subject-matter of the enactment, and the various circumstances that may make the one construction or the other reasonable or unreasonable. There is no difference, for instance, in the kind of language used by acts of parliament which make the unauthorized possession of government stores a crime, and the language used in by-laws which say that if a man builds a house or a wall so as to encroach upon a space protected by the by-law from building he shall be liable to a penalty. Yet, in Regina v. Sleep, (1) it was held that a person in possession of government stores, marked with the broad arrow could not be convicted when there was not sufficient evidence to show that he knew they were so marked; whilst the mere infringement of a building by-law would entail liability to the penalty. There is no difference between the language by which it is said that a man shall sweep the snow from the pavement in front of his house before a given hour in the morning, and if he fail to do so shall pay a penalty, and that by which it is said that a man sending vitriol by railway shall mark the nature of the goods on the package on pain of forfeiting a sum of money; and yet I suppose that in the first case the penalty would attach if the thing were not done, whilst in the other case it has been held, in Hearne v. Garten, (2) that, where the sender had made reasonable inquiry and was tricked into the belief that the goods were of an innocent character, he could not be convicted, although he had in fact sent the vitriol not properly marked. There is no difference between the language by which it is enacted that 'whosoever shall unlawfully and wilfully kill any pigeon under such circumstances as shall not amount to a larceny at common law' shall be liable to a penalty, and the language by which it is enacted that 'if any person shall commit any trespass by entering any land in the day-time in pursuit of game' he shall be liable to a penalty; and yet in the first case it has been held that his state of mind is material, (Taylor v. Newman) (3), in the second, that it is immaterial (Watkins v. Major) (4). So, again, there is no diffe-

(1) Reg. v. Sleep, L. & C. 44: 30 L. J., (M. C.) 170.
(2) Hearne v. Garton, 2 El. & E. 66.
(3) Taylor v. Newman, 4 Best & S. 89.
(4) Watkins v. Major, L. R. 10 C. P. 662.

rence in language between the enactments I have referred to in which the absence of a guilty mind was held to be a defence, and that of the statute which says that 'any person who shall receive two or more lunatics' into any unlicensed house shall be guilty of a misdemeanor, under which the contrary has been held. (1) A statute provided that any clerk to justices who should, under color and pretence of anything done by the justice or the clerk, receive a fee greater than that provided for by a certain table, should for every such offence forfeit £20. It was held that where a clerk to justices *bona fide* and reasonably but erroneously believed that there were two sureties bound in a recognizance besides the principal, and accordingly took a fee as for three recognizances, when he was only entitled to charge for two, no action would lie for the penalty. '*Actus*,' says Lord Campbell, '*non facit reum, nisi mens sit rea.* Here the defendant very reasonably believing that there were two sureties bound, besides the principal, has not, by making a charge in pursuance of his belief, incurred the forfeiture. The language of the statute is, *for every such offence.* If, therefore, the table allowed him to charge for three recognizances where there are a principal and two sureties, he has not committed an offence under the act. (2)

"If identical language may thus be legitmately construed in two opposite senses, and is sometimes held to imply that *there is*, and sometimes that *there is not*, an offence, when the guilty mind is absent, it is obvious that assistance must be sought *aliunde*, and that all circumstances must be taken into consideration which tend to shew that the one construction or the other is reasonable; and amongst such circumstances it is impossible to discard the consequences. This is a consideration entitled to little weight, if the words be incapable of more than one construction; but I have, I think, abundantly shown that there is nothing in the form of words used in the enactment now under consideration to prevent the application of what is certainly the normal rule of construction in the case of a statute constituting an offence entailing severe and degrading punishment.

"If the words are not conclusive in themselves, the reasonableness or otherwise of the construction contended for has always been recognized as a matter fairly to be taken into account. In a case in which a woman was indicted under 9 and 10 Wm. III., c. 41, s. 2, for having in her possession, *without a certificate* from the proper authority, government stores, marked in the manner described in the act it was argued that, having the certificate was, under that statute, made the sole excuse, and that as the woman had no certificate, she must be convicted. Foster, J., said, however, that, though the words of the statute seemed to exclude any other excuse, yet the circumstances must be taken into consideration; otherwise a law, intended for wise purposes, might be the handmaid to oppression, and he directed the jury that if they thought the defendant came into the possession of the stores without any fraud or misbehaviour on her part, they ought to acquit her (3). In Rex. v. Banks, (4) the same ruling was adopted by Lord Kenyon, who considered it beyond question that the defendant might excuse himself by shewing that he came innocently into such possession, and he treated the unqualified words of the statute as *merely* shifting the burden of proof and making it necessary for the defendant to show matter of excuse, and to negative the guilty mind, instead of its being necessary for the Crown to show the existence of the guilty mind. He held that *prima facie*, the statute was satisfied when the case was brought within its terms, and that it then lay upon the defendant to prove that the violation of the law which had taken place had been committed accidentally or innocently so far as he was concerned.

"Suppose a man had taken up, by mistake one of two baskets exactly alike and of similar weight, one of which contained innocent articles belonging to himself and the other marked government stores, and was caught with the

(1) Reg. v. Bishop, 5 Q. B. D. 259
(2) Bowman v. Blyth, 7 El. & B. 26, 43.
(3) Fost C. L. (3 Ed.) App. 439, 440.
(4) Rex. v. Banks, 1 Esp. 144.

wrong basket in his hand. He would by his own act have brought himself within the very words of the statute. Who would think of convicting him? And yet, what defence could there be, except that his mind was innocent and that he had not intended to do the thing forbidden by the statute?

"These decisions of Foster, J., and Lord Kenyon have been repeatedly acted upon. (1)

"Now, in the present instance, one consequence of holding that the offence is complete, if the husband or wife is *de facto* alive at the time of the second marriage, although the defendant had, at that time, every reason to believe the contrary, would be that, though the evidence of death should be sufficient to induce the Court of Probate to grant probate of the will or administration of the goods of the man supposed to be dead, the latter's wife, who had married six years and eleven months after the last time that she had known him to be alive, would be guilty of felony, in case he should turn up twenty years afterwards. It would be scarcely less unreasonable to enact that those who had, in the meantime distributed his personal estate, under letters of administration, should be guilty of larceny.

"I am well aware that the mischief which may result from bigamous marriages, however innocently contracted, are great; but I cannot think that the appropriate way of preventing them is to expose, to the danger of a cruel injustice, persons whose only error may be that of acting upon the same evidence as has appeared perfectly satisfactory to a Court of Probate, a tribunal emphatically difficult to satisfy in such matters, and certain only to act upon what appears to be the most cogent evidence of death.

"It is said, in respect of the offence now under discussion, that the proviso in 24 and 25 Vict., ch. 150, § 57, that 'nothing in the section shall extend to any person marrying a second time whose husband or wife shall have been continually absent from such person for seven years last past, and shall not have been known by such person to be living within that time,' points out the sole excuse which the act allows. I cannot see what necessity there is for drawing any such inference. It seems to me that it merely specifies one particular case, and indicates what in that case shall be sufficient to exempt the party without any further inquiry from criminal liability; and I think it is an argument of considerable weight, in this connection, that under 9 and 10 Wm. III., ch. 41, § 2, where a similar contention was founded upon the specification of one particular circumstance under which the possession of government stores should be justified, successive judges and courts have refused to accede to the reasoning, and have treated it, to use the words of Lord Kenyon, as a matter that, '*could bear no question*,' that the defendant might shew, in other ways, that his possession was without fraud." (2)

After reviewing critically the conflicting decisions, upon the point in question, Mr. Justice Wills continued. "There is nothing, in the state of the authorities, directly bearing upon the question, to prevent one from deciding it upon the grounds of principle. It is, however, suggested that the important decision of the court of fifteen judges, in Regina v. Prince, (3) is an authority in favor of a conviction in this case. I do not think so.

"In Regina v. Prince, the defendant was indicted under 24-25 Vict., c, 100, sec. 55 for 'unlawfully taking an unmarried girl, then being under the age of sixteen years, out of the possession and against the will of her father.' The jury found that the prisoner *bonâ fide* believed upon reasonable grounds that she was eighteen. The court upheld the conviction. Two judgments were delivered by a majority of the court, in each of which several judges concurred, whilst three

(1) See Reg. v. Wilmett, 3 Cox C. C. 281; Reg. v. Cohen, 8 Cox C. C. 41; Reg. v. O'Brien, 15 L. T. (N. S.) 419.

(2) Rex. v. Banks, *supra*.

(3) Reg. v. Prince, L. R., 2 C. C. R. 154, 175.

of them, Denman, J., Pollock, B, and Quain, J., concurred in both. The first of the two, being the judgment of nine judges, upheld the conviction upon the ground that, looking to the subject-matter of the enactment, to the group of sections amongst which it is found, and to the history of legislation on the subject, the intention of the legislature was that, if a man took an unmarried girl under sixteen out of the possession of her father, against his will, he must take his chance of whether any belief he might have about her age was right or wrong, and if he make a mistake upon this point so much the worse for him; he must bear the consequences. The second of the two judgments gives a number of other reasons for arriving at the same conclusion, some of them founded upon the policy of the legislature, as illustrated by other associated sections of the same act. This judgment contains an emphatic recognition of the doctrine of the 'guilty mind,' as an element, in general, of a criminal act, and supports the conviction upon the ground that the defendant, who believed the girl to be eighteen and not sixteen, even then, in taking her out of the possession of the father, against his will, was doing an act wrong in itself. 'This opinion,' says the judgment, 'gives full scope to the doctrine of the *mens rea*.'

"The case of Regina v. Prince, therefore, is a direct and cogent authority for saying that the intention of the legislature cannot be decided upon simple prohibitory words, without reference to other considerations. The considerations relied upon in that case are wanting in the present case, whilst, as it seems to me, those which point to the application of the principle underlying a vast area of criminal enactment, that there can be no crime without a tainted mind, preponderate greatly over any that point to its exclusion.

"In my opinion, therefore, this conviction ought to be quashed."

Mr. Justice Cave, in the course of his remarks, said:—

"At common law, an honest and reasonable belief in the existence of circumstances which, if true, would make the act, for which a prisoner is indicted, an innocent act has always been held a good defence. Honest and reasonable mistake stands on the same footing as absence of the reasoning faculty,—as, in infancy,—or perversion of that faculty,—as in lunacy; and it has never been suggested that these exceptions do not equally apply in the case of statutory offences, unless they are excluded, *expressly* or by *necessary implication*.

"In Regina v. Prince, in which the principle of mistake underwent much discussion, it was not suggested by any of the judges that the exception of honest and reasonable mistake was not applicable to all offences, whether existing at common law or created by statute. The difference of opinion in that case was as to the exact extent of the exception, Brett, J., the dissenting judge, holding that it applied wherever the accused honestly and reasonably believed in the existence of circumstances which, if true, would have made his act not criminal, while the majority of the judges seem to have held that, in order to make the defence available in that case, the accused must have proved the existence in his mind of an honest and reasonable belief in the existence of circumstances which, if they had really existed, would have made his act not only *not criminal*, but also not *immoral*.

"In the present case, the jury have found that the accused honestly and reasonably believed in the existence of a state of circumstances, namely,—in her first husband's death,—which, had it really existed, would have rendered her act, in marrying again, not only *not criminal*, but also *not immoral*.

"It is argued, however, that assuming the general exception to be as stated, yet the language of the act is such that that exception is necessarily excluded in this case. Now, it is undoubtedly within the competence of the legislature to enact that a man shall be branded as a felon and punished for doing an act which he honestly and reasonably believes to be lawful and right; just as the legislature may enact that a child or a lunatic shall be punished criminally for an act which he has been led to commit by the immaturity or perversion of his reasoning faculty. But such a result seems so revolting to the moral sense that we ought to require the clearest and most indisputable evidence that such is

really the meaning of the act. It is said that this inference necessarily arises from the language of the section in question, and particularly of the *proviso*. The section (omitting immaterial parts) is in these words: 'Whosoever being married shall marry any other person *during the life of the former husband or wife* shall be guilty of felony; *provided*, that nothing in this section contained shall extend to any person marrying a second time whose husband or wife shall have been continually *absent* from such person for the space of *seven years* then last past, and shall *not* have been *known* by such person *to be living* within that time.' It is argued that the *first* part is expressed absolutely; but surely it is not contended that the language admits of no exception, and therefore that a lunatic who, under the influence of a delusion, marries again, must be convicted; and, if an exception is to be admitted where the reasoning faculty is perverted by disease, why is not an exception equally to be admitted where the reasoning faculty, although honestly and reasonably exercised, is deceived? But it is said that the *proviso* is inconsistent with the exception contended for; and, undoubtedly, if the proviso covers less ground or only the same ground as the exception, it follows that the legislature has expressed an intention that the exception shall not operate until after seven years from the disappearance of the first husband. But if, on the other hand, the proviso covers more ground than the general exception, surely it is no argument to say that the legislature must have intended that the more limited defence shall not operate within the seven years because it has provided that a less limited defence shall only come into operation at the expiration of those years.

"What must the accused prove to bring herself within the *general exception*? She must prove facts from which the jury may reasonably infer that she honestly and on reasonable grounds believed her first husband to be dead before she married again. What must she prove to bring herself within the *proviso*? Simply that her husband has been continually absent for seven years; and if she can do that it will be no answer to prove that she had no reasonable grounds for believing him to be dead, or that she did not honestly believe it. Unless the prosecution can prove that she knew her husband to be living within the seven years she must be acquitted. The honesty or reasonableness of her belief is no longer in issue. Even if it could be proved that she believed him to be alive all the time, as distinct from knowing him to be so, the prosecution must fail. The proviso, therefore, is far wider than the general exception; and the intention of the legislature, that a wider and more easily established defence should be open after seven years from the disappearance of the husband, is not necessarily inconsistent with the intention that a different defence, less extensive and more difficult of proof, should be open within the seven years.

"For these reasons I am of opinion that the conviction cannot be supported."

In the course of an elaborate declaration of his concurrence in the judgment quashing the conviction, Stephen, J. said:

"The mental elements of different crimes differ widely. 'Mens rea' means in the case of murder, malice aforethought; in the case of theft, an intention to steal; in the case of rape, an intention to have forcible connection with a woman without her consent; and in the case of receiving stolen goods knowledge that the goods were stolen. In some cases it denotes mere inattention. For instance, in the case of manslaughter by negligence, it may mean forgetting to notice a signal. It appears confusing to call so many dissimilar states of mind by one name. It seems contradictory, indeed to describe a mere absence of mind as a '*mens rea*,' or guilty mind The expression again is likely to and often does mislead. To an unlegal mind it suggests that by the law of England no act is a crime which is done from laudable motives; in other words, that immorality is essential to crime.

"Like most Latin maxims, the maxim on *mens rea* appears to me to be too short and antithetical to be of much practical value. I have tried to ascertain its origin, but have not succeeded in doing so.

"The principle involved appears to me, when fully considered, to amount to no more than this. The full definition of every crime contains, expressly or by implication, a proposition as to a state of mind. Therefore if the mental element

of any conduct alleged to be a crime is proved to have been absent in any given case, the crime so defined is not committed. The mental element of most crimes is marked by one of the words 'maliciously,' 'fraudulently,' 'negligently' or 'knowingly,' but it is the general—I might, I think, say the invariable practice of the legislature to leave unexpressed some of the mental elements of crime. In all cases whatever, competent age, sanity and some degree of freedom from some kinds of coercion are assumed to be essential to criminality, but I do not believe they are ever introduced into any statute by which any particular crime is defined.

"The meanings of the words 'malice,' 'negligence' and 'fraud,' in relation to particular crimes, has been ascertained by numerous cases. Malice means one thing in relation to murder, another in relation to the Malicious Mischief act, and a third in relation to libel, and so of fraud and negligence.

"With regard to knowledge of fact, the law, perhaps, is not quite so clear, but it may, I think, be maintained that in every case knowledge of fact is, to some extent, an element of criminality as much as competent age and sanity. Levitt's case, (1) decides that a man who, making a thrust with a sword at a place where, upon reasonable grounds, he supposed a burglar to be, killed a person who was not a burglar, was held not to be a felon, but in the same situation, in regard to the homicide, as if he had killed a burglar.

"Apart, indeed, from the present case, I think it may be laid down as a general rule, that an alleged offender is deemed to have acted under that state of facts which he in good faith and on reasonable grounds believe to exist when he did the act alleged to be an offence.

"I think that the case reserved falls under the general rule as to mistakes of fact, and that the conviction ought to be quashed."

After discussing the arguments supposed to lead to the opposite conclusion and after reviewing the case of Regina v. Prince, Stephen, J., added:—

"It appears to me that every argument which showed, in the opinion of the judges in Regina v. Prince, that the legislature meant seducers and abductors to act at their peril, shows that the legislature did not mean to hamper—with a liability to seven years' penal servitude,—what is not only intended, but naturally and reasonably supposed by the parties, to be a valid and honorable marriage.

"It is argued that the proviso that a remarriage, after seven years' separation, shall not be punishable, operates as a tacit exclusion of all other exceptions to the penal part of the section. It appears to me that it only supplies a rule of evidence which is useful in many cases, in the absence of explicit proof of death. But it seems to me to show, not that belief in the death of one married person excuses the marriage of the other only after seven years' separation, but that mere separation for that period has the effect which reasonable belief of death caused by other evidence would have at any time. It would, to my mind, be monstrous to say that seven years' separation should have a greater effect in excusing a bigamous marriage than positive evidence of death, sufficient for the purpose of recovering a policy of assurance or obtaining probate of a will."

The remarks of Manisty, J., one of the dissenting judges, were, briefly stated, as follows:

"In view of the plain language of the statute it is, in my opinion, the imperative duty of the court to give effect to it, and to leave it to the legislature to alter the law, if it thinks it ought to be altered.

"No doubt, in construing a statute, the intention of the legislature is what the court has to ascertain, but the intention must be collected from the language used, and where that language is plain and explicit and free from all ambiguity, as it is in the present case, I have always understood that it is the imperative duty of judges to give effect to it.

"The cases of insanity, etc., on which reliance is placed, stand on a totally different principle, viz., that of an absence of *mens*. Ignorance of the law is no excuse for the violation of it, and if a person choose to run the risk of commiting

(1) R. v. Levett, Cro. Car. 538; 4 Bl. Com. 27; Fost. 274.

a felony, he or she must take the consequences, if it turn out that a felony has been committed."

After discussing the statute and its different clauses, in connection with the case of Regina v. Prince, the learned judge continued:

"I rely very much upon the fifth section of the act passed in 1885 for the better protection of women and girls (48 and 49 Vict., c. 69), by which it was enacted that 'any person who unlawfully and carnally knows any girl above thirteen and under sixteen years shall be guilty of a misdemeanor,' but to that is added a proviso that, 'it shall be a sufficient defence if it be made to appear to the court or jury before whom the charge shall be brought that the person charged had reasonable cause to believe and did believe that the girl was of or above the age of sixteen.' It is to be observed that, notwithstanding that the word 'unlawfully' appears in this section, it was considered necessary to add the proviso, without which it would have been no defence that the accused had reasonable cause to believe and did believe that the girl was of or above the age of sixteen. Those who hold that the conviction, in the present case, should be quashed really import into the fifty-seventh section of the 24 and 25 Vict., ch. 100, the proviso which is in the fifth section of the 48 and 49 Vict., ch. 69, contrary, as it seems to me, to the decision in Regina v. Prince, and to the hitherto undisputed canons for construing a statute.

"So far as I am aware, in none of the cases cited by my learned brothers was the interest of third parties, such as the fact of there being children of the second marriage, involved. I have listened with attention to the judgments which have been delivered, and I have not heard a single observation with reference to this, to my mind, important and essential point. I am absolutely unable to distinguish Regina v. Prince from the present case, and looking to the names of the eminent judges who constituted the majority in that case, and to the reasons given in their judgments, I am of opinion, upon authority as well as principle, that the conviction should be affirmed." (1)

Other grounds of defence to a prosecution for bigamy are that, before the second marriage the party indicted was divorced from the bond of the first marriage; or that the first marriage has been declared void by a court of competent jurisdiction.

It was formerly considered that no sentence or act of a foreign country or state could dissolve, *a vinculo matrimonii*, an English marriage, for grounds on which it was not liable to be so dissolved in England.

This rule seems to have been adopted in the case of R. v. Lolley, in which a Scotch divorce, *a vinculo matrimonii*, for the husband's adultery,—the marriage having been solemnized in England,—was held to be invalid in England, the husband's adultery alone, unaccompanied with cruelty or desertion not being, under English law, a sufficient ground for a divorce, *a vinculo matrimonii*: but there was in this case an additional question of domicile involved: for not only was the marriage solemnized in England, but the parties were, at the time of the granting of the divorce, domiciled there; and this alone, would have been a good ground for holding the divorce granted by a Scotch Court, invalid, in England, independently of and without reference to the rule above alluded to. (2) In fact that rule has by the English Court of Appeal, been since denied to be law, in a later case, in which the marriage was also solemnized in English, the parties being a Scotchman and an English woman. In this case, also, the decree of divorce *a vinculo*, was granted by a Scotch Court and the ground of divorce was one for which a divorce is not obtainable in England, but there was this difference, that the husband's domicile was in Scotland; and the Scotch divorce, in this case, was held to be valid in England, on the ground that although the marriage had been solemnized in ngland, the question of divorce was not an incident of the marriage contract to be governed by the *lex loci contractus*, but an incident of status to be disposed of by the law of the domicil of the parties,—that is to say, the domicil of

(1) Reg. v. Tolson, 23 Q. B. D. 168; 58 L. J. (M. C.) 97.
(2) R. v. Lolley, R. & R. 238.

the husband ; and in its judgment the English Court of Appeal specially pointed out that the Scotch divorce *a vinculo* which in R. v. Lolley, was held to be invalid in England was that of persons whose marriage had been solemnized in England, and whose domicil at the time of the divorce was also *English*. (1)

Although, in the first part of article 275, bigamy is defined to be the act of a person who, being married, marries another person, *in any part of the world*, subsection 4 modifies the latter part of this clause by declaring that ;—

"No person shall be liable to be convicted of bigamy in respect of having gone through a form of marriage in a place *not in Canada*, unless such person, being a British subject resident in Canada, leaves Canada with intent to go through such form of marriage."

The explanation of this proviso given by Sir John Thompson, during the progress of the Code through the Committee of the House of Commons, was to this effect, that, Canada being a colony, and our parliament, having power only to legislate for offences committed within Canada, the clause was intended to restrict, to our own jurisdiction, the early words of the Article, speaking of marriages *in any part of the world* ; and to, thus, make it an offence to leave Canada for the purpose of committing bigamy in any other part of the world,—that being the full extent of the power of the Canadian Parliament, as a colonial Legislature, according to a decision, in that respect, rendered in regard to the jurisdiction of an Australian Parliament, by which it was held that, although the words used extended beyond the territorial jurisdiction of the parliament, the parliament had no authority, and that its legislation must be confined to its jurisdiction and be interpreted accordingly. Sir John Thompson added : "While it is, morally, the same offence to commit bigamy outside our jurisdiction, all we can do is to punish any person who leaves this country for the purpose of committing it."(2.)

The case here referred to, by Sir John Thompson, is, evidently, that of McLeod v. Attorney General for New South Wales, decided, two years ago, on an appeal to the Privy Council, in England, from a judgment of the Supreme Court of New South Wales, the latter judgment having rejected an appeal from a conviction by the Court of Quarter Sessions at Sidney.

It appears that, at Sidney in May 1890, the appellant was tried, found guilty of bigamy and sentenced to three years' imprisonment with hard labor ; the following facts being proved at the trial :

The appellant, a British subject, was a Minister of the Presbyterian Church in the colony of New South Wales, where he married his first wife, in 1872. After residing there for some time he and his wife left, and went to Scotland, thence to Canada, thence back to Scotland, thence to New-Zealand, and from there they returned to New South Wales in 1887. They again left, and went to the United States, and thence to London, where on the 25th June 1888, the appellant's wife left him and returned to New South Wales. Subsequently, in May 1889 the appellant married another woman, at St. Louis, Missouri, in the United States, his first wife being still alive, he and his second wife, after their marriage, living together as husband and wife. The appellant, however, in March 1889, before the second marriage, had obtained from a district Court of the United States,—Territory of New Mexico,—a decree of divorce from his first wife ; which decree was put in evidence at the trial ; but it was found to be a decree which had been obtained without notice having been given to the first wife of the divorce proceedings.

The appellant's counsel, objected to the reception in evidence of certain letters from the appellant, on the ground that they were immaterial, written after the second marriage, and could not be used as admissions ; but the letters were admitted as tending to prove the bigamous marriage.

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(1) Harvey v. Farnie, L. R. 5 P. D. 153 ; L. R. 6 P. D. 35 ; Arch. Cr. Pl. & Ev. 21 Ed. 1024.

(2) See House of Commons Debates, in Extra Appendix, *post*.

The marriage certificate and the copy of the marriage license, with the solemnization of the marriage certified, by the officiating minister, at the foot thereof were also objected to; but they were admitted in evidence

At the request of the appellant's counsel the trial judge, or chairman of the Court of Quarter Sessions, reserved, for the opinion of the Supreme Court of the Colony, the following points, namely, 1. Were the letters and documents, objected to, rightly admitted? and 2. Was it right to direct the jury that, if they were satisfied that the appellant had gone through the form and ceremony of marriage with Miss Cameron, he could be found guilty of bigamy. although no formal evidence was given as to the marriage laws of the State of Missouri?

The Colonial Supreme Court confirmed the ruling of the lower court and upheld the conviction.

In the Privy Council the judgment of their Lordships, delivered by the Lord Chancellor (Halsbury), was as follows:—

"The facts upon which this appeal arises are very simple. The appellant was, on the 13th July, 1872, at Darling Point, in the colony of New South Wales, married to one Mary Manson, and, in her lifetime, on the 8th May. 1889, he was married at St. Louis, in the State of Missouri, in the United States of America, to Mary E izabeth Cameron. He was afterward indicted, tried and convicted, in the colony of New South Wales, for the offence of bigamy, under the 54th section of the Criminal Law Amendment Act of 1883 (46 Vict., No. 17). That section, so far as it is material to this case, is in these words: 'Whosoever being married, marries another person during the life of the former husband or wife—wheresoever such second marriage takes place—shall be liable to penal servitude for seven years.' In the first place, it is necessary to construe the word 'whosoever'; and in its proper meaning it comprehends all persons all over the world, natives of whatever country. The next word which has to be construed is 'wheresoever.' There is no limit of person, according to one construction of 'whosoever'; and the word 'wheresoever' is equally universal in its application. Therefore, if their Lordships construe the statute as it stands, and upon the bare words, any person, married to any other person, who marries a second time anywhere in the habitable globe, is amenable to the criminal jurisdiction of New South Wales, if he can be caught in that colony. That seems to their Lordships to be an impossible construction of the statute; the colony can have no such jurisdiction, and their Lordships do not desire to attribute to the colonial Legislature an effort to enlarge their jurisdiction to such an extent as would be inconsistent with the powers committed to a colony, and, indeed, inconsistent with the most familiar principles of international law. It therefore becomes necessary to search for limitations, to see what would be the reasonable limitation to apply to words so general; and their Lordships take it that the words 'whosoever being married' mean, 'whosoever being married, *and amenable at the time of the offence committed to the jurisdiction of the colony of New South Wales.*' The word 'wheresoever' is more difficult to construe, but when it is remembered that in the colony, as appears from the statutes that have been quoted to their Lordships, there are subordinate jurisdictions, some of them extending over the whole colony, and some of them, with respect to certain classes of offences, confined within local limits of venue, it is intelligible that the 54th section may be intended to make the offence of bigamy justiceable all over the colony, and that no limits of local venue are to be observed in administering the criminal law in that respect. 'Wheresoever,' therefore, may be read 'Wheresoever *in this colony* the offence is committed.' It is to be remembered that the offence is the offence of marrying, the wife of the offender being then alive—going through in fact, the ceremony of marriage with another person while he is a married man. That construction of the statute receives support from the subordinate arrangements which the statute makes for the trial, the form of the indictment, the venue, and so forth. The venue is described as New South Wales and sect. 309 of the statute provides that 'New South Wales shall be a sufficient venue for all places, whether the indictment is in the Supreme Court, or any other court having criminal jurisdiction. Provided that some district, or place, within, or at, or near which, the offence is charged to have been com-

mitted, shall be mentioned in the body of the indictment. And every such district or place shall be deemed to be in New South Wales, and within the jurisdiction of the court *unless the contrary be shown*.' That, by plain implication, means that the venue shall be sufficient, and that the jurisdiction shall be sufficient, unless the contrary is shown. Upon the face of this record the offence is charged to have been committed in Missouri, in the United States of America, and it therefore appears to their Lordships that it is manifestly shown, beyond all possibility of doubt, that the offence charged was an offence which if committed at all, was committed in another country, beyond the jurisdiction of the colony of New South Wales. The result, as it appears to their Lordships, must be that there was no jurisdiction to try the alleged offender for this offence, and that this conviction should be set aside. Their Lordships think it right to add that they are of opinion that, if the wider construction had been applied to the statute and it was supposed that it was intended thereby to comprehend cases so wide as those insisted on at the bar, it would have been beyond the jurisdiction of the colony to enact such a law. Their jurisdiction is confined within their own territories, and the maxim which has been more than once quoted, *extra territorium jus dicenti impune non paretur*, would be applicable to such a case. Lord Wensleydale, (when Baron Parke), advising the House of Lords in Jefferys v. Boosey (1) expressed the same proposition in very terse language. He says: 'The legislature has no power over any persons except its own subjects, that is, persons natural-born, or resident, while they are within the limits of the Kingdom. The legislature can impose no duties except on them; and, when legislating for the benefit of persons, must *prima facie* be considered to mean the benefit of those who owe obedience to our laws, and whose interests the legislature is under a correlative obligation to protect.' All crime is local. The jurisdiction over the crime belongs to the country where the crime is committed, and except over her own subjects Her Majesty and the Imperial Legislature have no power whatever. It appears to their Lordships that the effect of giving the wider interpretation to this statute necessary to sustain this indictment would be to comprehend a great deal more than He Majesty's subjects; more than any persons who may be within the jurisdiction of the colony by any means whatsoever; and that, therefore, if that construction were given to the statute it would follow as a necessary result that the statute was *ultra vires* of the colonial legislature to pass. Their lordships are far from suggesting that the legislature of the colony did mean to give to themselves so wide a jurisdiction. The more reasonable theory to adopt is, that the language was used subject to the well-known and well-considered limitation, that they were only legislating for those who were actually within their jurisdiction, and within the limits of the colony. For these reasons their Lordships will humbly advise Her Majesty that the judgment of the Supreme Court should be reversed, and that this conviction should be set aside." (2)

In an American case a somewhat similar decision was rendered, under the following circumstances. The Code of the State of North Carolina provides that "if any person, being married, shall marry any other person during the life of the former husband or wife, *whether the second marriage shall have taken place in the State of North Carolina or elsewhere*, every such offender shall be guilty of a felony, and every such offence shall be punished in the county where the offender shall be apprehended *as if actually committed there*"; and the Supreme Court of North Carolina considered such a provision repugnant to the constitution, and held that an indictment would not lie against the defendant for having contracted a bigamous marriage in South Carolina and afterwards coming into the State of North Carolina to cohabit with the person so married.

Avery, J., in the course of his remarks in rendering the judgment, said:

"The general rule is that the laws of a country do not take effect beyond its

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(1) Jefferys v. Boosey, 4 H. of L. Cas. 815–926.
(2) McLeod v. Attorney Gen. N. South Wales, 14 L. N. 402–405.

territorial limits, (1) and that a state will take cognizance only of offences committed within its boundaries. Among the exceptions to this general rule are the cases where one, being at the time in another state or country, does a criminal act which takes effect in our own state; as where one, who is abroad, obtains goods from some one here by false pretences, or, from a stand point beyond the line of our state, fires a gun or sets in motion any force that inflicts within the state an injury for which a criminal indictment will lie. (2) Persons guilty of such acts are liable to indictment and punishment when they venture voluntarily within the territorial bounds of the offended sovereignty, or, when, under the provisions of extradition laws and treaties they are allowed to be brought into its limits to answer such charges.

"It was contemplated by the framers of the constitution that ordinarily there would be but one state where a crime could be properly said to have been committed, and whose courts would have cognizance of it.

"The state of South Carolina was the sovereign whose authority was disregarded when the bigamous marriage was celebrated. The completed act of entering into a second marriage in a neighboring state is not analogous to the cases where a mortal wound is inflicted in one state, and the wounded man lingers and dies from its effects within the limits of another state during the next ensuing twelve months.

"The attempt to evade the organic law by making the coming into this state, (after committing an offence in another), a crime is too palpable, in view of the admitted fact that the constitution of the United States gives to citizens of all the States the immunities and privileges of its own citizens, and of their guaranteed right, under the interstate commerce clause, to pass through another state without arrest and inquiry into their accountability for offences against their own sovereignty, but especially because the trial for the new felony involves an investigation of the original bigamy by a jury not of the vicinage, and remote from witnesses. No court has ever questioned the power of a state to pass quarantine laws and statutes regulating the entrance of paupers within its limits, but this does not include the authority to impose a tax *per capita*, even on immigrants from a foreign nation arriving at its ports, or on passengers *in transitu* from one state to another. (3)

"When the act of bigamous marriage is made the subject of indictment, the place of such act has exclusive jurisdiction. (4) The court of Alabama has expressly held, in Beggs v. State, that where a person is indicted for the bigamous act of marrying a second time, in another state, the indictment could not be sustained. (5)

"If a state has the power to punish one caught within its borders as a felon for a bigamous marriage committed within another state, what is to prevent the trial of a citizen found in a neighboring state for a homicide, if the statute were broad enough to include murder as well as bigamy—if the statute made it a felony punishable with death to come into the state after committing murder in another? The express provision for the extradition of criminals excludes the idea of trying them outside of the limits of the state where the offence is committed, even if there were no direct guaranty that they should not be subject to arrest and trial for offences against their own sovereign, when beyond her limits.

"The additional counts in which it is charged that the defendant, after the bigamous marriage in South Carolina, came into North Carolina, and cohabited with the person to whom he was married, cannot be sustained, because that offence is not covered by our statute.

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(1) 1 Bish. Cr. L., 7 Ed., ss. 109, 110; People v. Tyler, 7 Mich. 161; 8 Mich. 338; State v. Barnett, 83 N. C. 616.
(2) 1 Bish. Cr. L., s. 110; Ham v. State, 4 Tex. App. 659.
(3) Norris v. Boston, & Smith v. Turner, 2 Myers Fed. Dig. 665, 675, 677, 684.
(4) 2 Whart. Cr. L. s. 1685.
(5) Beggs v. State, 55 Ala. 108.

"We do not, however, wish to be understood as questioning the power of the state to punish one of its citizens who goes out of the state with intent to evade its laws by celebrating a bigamous marriage beyond its jurisdiction, and returning to live within its borders. We affirm the judgment of the court below quashing the indictment. (1)

A decree of divorce obtained in a foreign court may be impeached by extrinsic evidence shewing that such court had no jurisdiction or that such decree was obtained by fraud. (2)

277. Feigned marriages.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who procures a feigned or pretended marriage between himself and any woman, or who knowingly aids and assists in procuring such feigned or pretended marriage. R.S.C., c. 161, s. 2.

Under article 684, *post*, no person can be convicted of an offence against article 277 upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused.

278. Polygamy.—Every one is guilty of an indictable offence and liable to imprisonment for five years, and to a fine of five hundred dollars, who—

(*a*.) practises, or, by the rites, ceremonies, forms, rules or customs of any denomination, sect or society, religious or secular, or by any form of contract, or by mere mutual consent, or by any other method whatsoever, and whether in a manner recognized by law as a binding form of marriage or not, agrees or consents to practise or enter into

(i.) any form of polygamy ;

(ii.) any kind of conjugal union with more than one person at the same time ;

(iii.) what among the persons commonly called Mormons is known as spiritual or plural marriage ;

(iv.) 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

(*b*.) 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

(*c*.) 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

(*d*.) procures, enforces, enables, is a party to, or assists in the execution of, any such form of contract which so purports, or the giving of any such consent which so purports. 53 V., c. 37, s. 11.

This is a re-enactment of 53 Vict., c. 37, sec. 11 ; shortly after the passing of which it was held, that mere cohabitation was not sufficient to sustain a con-

(1) State v. Cutshall, (S. C.), 15 S. E. Rep. 261.
(2) R. v. Wright, 1 P. & B. 363.

viction under it. The point came up before the Court of Appeals of the Province of Quebec at Montreal in March 1891, in a case in whith one Labrie, a married man, was tried for living and cohabiting, in conjugal union, with Rosa Ada Martin, the wife of Joseph B Martin.

Proof was made of the fact of cohabitation and of the parties being married to other persons. It was claimed, however, by the defendant's counsel, Mr. St. Pierre, that there was no offence upon which a conviction could be legally sustained; that the clause "who lives, cohabits, or agrees or consents to live or cohabit, in any kind of *conjugal union* with a person who is married to another, or with a person who lives or cohabits with another or others in any kind of *conjugal union*" was aimed at the repression of Mormonism, and was taken from the Edmund's Act in the United States; that it was not intended to prevent mere immorality but only applied to Mormons and the like, who before cohabiting together go through a marriage of some sort,—a "*conjugal union*,"—supposed to be binding upon them.

For the Crown it was contended that the law applied to any one who, being married, cohabited or agreed or consented to cohabit with another married person.

The defendant being found guilty, Mr. Justice Baby reserved the point raised by the defence.

The late Chief Justice Dorion, in delivering the judgment of the court, quashing the conviction, said, that it was apparent from the Act that there must be some form of contract between the parties which they might suppose to be binding on them, but which the law was intended to prohibit, and that in this case, therefore, there was no offence shewn within the meaning of the law. (1)

Proof of polygamy.—Article 706, *post*, provides that, "in the case of any indictment under section 278 (*b*), (*c*), and (*d*), no averment or proof of the method in which the sexual relationship charged was entered into, agreed to, or consented to, shall be necessary in any such indictment, or upon the trial of the person thereby charged: nor shall it be necessary upon such trial to prove carnal connection had or intended to be had between the persons implicated."

Where, in a prosecution for polygamy, the proof of the polygamous marriage consisted of the confessions of the accused, and circumstances tending to corroborate the confessions, the evidence, on conviction, was held sufficient to support the verdict. (2)

279. Solemnization of marriage without lawful authority.—Every one is guilty of an indictable offence and liable to a fine, or to two years' imprisonment, or to both who—

(*a.*) without lawful authority, the proof of which shall lie on him, solemnizes or pretends to solemnize any marriage; or

(*b.*) procures any person to solemnize any marriage knowing that such person is not lawfully authorized to solemnize such marriage, or knowingly aids or abets such person in performing such ceremony. R.S.C., c. 161, s. 1.

No prosecution for any offence under this article can be commenced after the expiration of two years from its commission. (See article 551*b*, *post*.

280. Solemnization of marriage contrary to law.—Every one is guilty of an indictable offence and liable to a fine, or to one year's

(1) Reg. v. Labrie, M. L. R., 7 Q B. 211.
(2) U. S. v. Bassett, (Utah Supr. Ct.), 13 Pac. Rep. 237.

imprisonment, who, being lawfully authorized, knowingly and wilfully solemnizes any marriage in violation of the laws of the province in which the marriage is solemnized. R.S.C., c. 161, s. 3.

281. Abduction of any woman of any age.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, with intent to marry or carnally know *any woman*, whether 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.

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 any one having such interest; or

(*b.*) *fraudulently allures, takes away* or *detains* any such woman, being *under* the age of *twenty-one years*, out of the possession and against the will of her father or mother, or of any other person 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.

It will be seen that article 281 applies to *every* woman,—whether over or under age, whether married or single, and whatever her position in life may be, so as to protect her from any interference,—either by her *abduction* or by her *detention* against her will, with intent to marry or carnally know her, or to cause her to be married or carnally known,—by rendering any one who thus interferes with her, liable to fourteen years imprisonment.

If the woman be taken away, in the first instance, with her own consent, but afterwards refuse to continue with the offender, and if, then, be still *detain* her, against her will, he is punishable, under article 281, for such detention. (1)

If, after having been, in the first instance, *forcibly* taken away, the woman be afterwards married or defiled, by or at the instance of her abductor, with her own consent, the offence will still be committed within the terms of the above enactment; for the offender is not to escape, from liability to punishment, by having prevailed over the weakness of a woman whom he originally got into

(1) See, also, 1 Hawk. c. 41, s. 7.

his power by such base means. (1) Even if she be taken away and married with her own consent, yet, it seems, that, if this be effected by means of fraud, it would still be within the law; for, she cannot, whilst under the influence of fraud, be considered a free agent. (2)

It has been held, heretofore, that the woman, though married by her abductor, is a competent witness against him, on the ground that, though she may be his wife *de facto*, she is not so, *de jure*; (3) but there can be no doubt, upon this point, now, under the *Canada Evidence Act*, 1893, sec. 4, *post*, which renders every accused person's wife or husband competent as a witness.

With regard to article 282, the first part of it (*a*) has reference to the *taking away* or the *detaining* of any heiress of any age, against her will, such taking or such detention being *from motives of lucre*, and with intent to marry or carnally know her or cause her to be married or carnally known.

As this clause, (*a*), of article 282 relates to and punishes with fourteen years imprisonment, the abduction or detention, *from motives of lucre*, of a woman, of any age,—having an interest in some property,—with intent, etc., and as article 281 relates to and punishes, in the same way, the abduction or detention of a woman of any age,—whether rich or poor, heiress or no heiress,—with intent, etc, *and without regard*, as a matter of course, *to any motives of lucre*, it would seem that, if the prosecution should be unable, in the case of an heiress, to make proof, either, of the defendant's mercenary motives, or of the facts which constitute the woman an heiress, so as to bring the case within the terms of clause (*a*) of article 282, the defendant could be convicted under article 281, without the necessity of making any such proof.

As the punishment, for the forcible abduction or detention of a woman, *with intent*, etc., is, under the terms of the two articles, 281 and 282(*a*), the same,—whether she be an heiress or a pauper, and, as, under article 281, the heiress,—as a *woman*, simply,—may prosecute and punish her abductor, independently of and without proving her riches or his motives of lucre, the special value of article 282, in regard, at least, to the case contemplated by clause (*a*) seems to lie in the extra provision contained in the second sub-section of the article, whereby the offender is rendered incapable of taking, even by marrying his victim, any estate or interest of any kind in her property.

With regard to clause (*b*) of article 282, that clause is for the protection of an heiress, under age, against being either *fraudulently allured* from or *taken away* or *detained*,—*with or without her own consent*,—out of the possession and *against the will* of her parents or guardian, with intent to marry or carnally know her or cause her to be married or carnally known.

In order to constitute the offence, it is not necessary, under either of the above articles, that there should be an actual marriage or a defilement.

The *taking away* or *detaining*, against the woman's will, or in the case of a minor heiress, the *fraudulent allurement* or the *taking* or *detaining* against the will of the parents or guardian, coupled in either case with the intent to marry or carnally know the woman, or have her married or carnally known, constitute the offence; and, upon an indictment under clause (*b*) of article 282, it is not necessary to show that the accused knew that the woman was an heiress, or had an interest in any property. (4)

The intent may be proved by the acts and declarations of the defendant, or it may be infered from the circumstances of the case. (5)

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(1) Fulwood's case, Cro. Car. 488; Swendon's case, 5 St. Tr. 450; 1 Hale, 660.
(2) R. v. Perry, 1 Hawk. c. 41, s. 13; 1 Russ. Cr. 710; R. v. Wakefield, Lancaster Assizes, 1827, 2 Lew. 279; Arch. Cr. Pl. & Ev., 21 Ed. 802.
(3) 1 Hale, 661; Brown's case, Ventr 243; 3 Keb. 193; R. v. Wakefield, *supra*.
(4) R. v. Kaylor, 1 Dor, Q. B. 364; Bur. Dig. 257.
(5) R. v. Barrett, 9 C. & P. 387.

Upon an indictment under any of the clauses of the above articles a verdict may in pursuance of article 711 *post*, be rendered finding the accused guilty of an attempt, if the evidence warrants it, and in that case he may be punished with seven years' imprisonment under article 528, *post*, or he may, in pursuance of article 713, be convicted of a common assault.

283. Unlawfully taking a girl under sixteen from her parents or guardians.—Every one is guilty of an indictable offence and liable to five years' imprisonment who unlawfully takes or causes to be taken any *unmarried girl*, being *under* the age of *sixteen years*, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her.

2. It is immaterial whether the girl is taken with her own consent or at her own suggestion or not.

3. It is immaterial whether or not the offender believed the girl to be of or above the age of sixteen. R.S.C., c. 162, s. 44.

The first clause of this article is to the same effect as the Imperial Statute on the subject, (24-25 Vict., c. 100, s. 55.)

The gist of the offence is the taking of the girl out of the possession of her parents or any one having legal care and charge of her.

It has been held that, if the girl,—without any persuasion, inducement or blandishment on the part of the defendant,—leaves her father, so that she has got fairly away from and entirely left home, and then subsequently, goes to the defendant, although, morally, it may be his duty to send her back to her father's possession, his not doing so is no infringement of this enactment; for it does not say that he shall *restore her*, but only that he shall not *take her away*. (1)

But, if the girl, while living at home with her father, leaves the house for a mere temporary purpose, intending to return home again, she is, in that case, still in her father's possession, within the meaning of the statute, and if, while she is so out of her father's house, temporarily, the defendant induces her to run away with him he is guilty of the above offence. (2)

Where the defendant met a girl in the street, and, after taking her with him to a neighboring town and there seducing her, returned with her and left her where he had met her, she going home to her father's house, where she lived, it was held that, the defendant, who had made no enquiry and did not know who the girl was nor whether she had a father living or not, could not be convicted of an offence, against sec. 55 of 24-25 Vic., c. 100, although he had no reason to believe and did not believe her to be a girl of the town. (3)

It is an offence, under this law, to take away a natural or illegitimate daughter under sixteen from the possession of her putative father. (4)

It has been held to be an abduction, under this law, to induce the parents, by false and fraudulent representations, to allow the defendant to take the girl away. (5)

Where a girl was encouraged by her mother in a loose course of life, by permitting her to go out alone at night and to dance at public-houses, from one of which places she went away with the defendant, it was held that she could not

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(1) R. v. Olifier, 10 Cox, 402.
(2) R. v. Mycock, 12 Cox, 28.
(3) R. v. Hibbert, L. R., 1 C. C. R. 184; 38 L. J. (M. C.) 61: See, also, R. v. Green, 3 F. & F. 274.
(4) 1 Hawk. c. 11, s. 14; R. v. Cornfield, 2 Str. 1162; R. v. Sweeting, 1 East, P. C. 457.
(5) R. v. Hopkins, C. & Mar. 254.

be said to be taken away against the mother's will within the meaning of this law. (1)

It should be proved that the girl was under sixteen and unmarried.

It has been held to be no defence, (2) and it is, by the third clause of the above article, expressly declared that it is immaterial, that, the offender believed the girl to be of or above the age of sixteen.

It has been held, and it is so declared by the second clause of the above article that the consent of the girl is immaterial; and the taking need not be by force actual or constructive; nor is it any legal excuse or any answer to the charge that there is an absence of any corrupt motive, or that the defendant made use of no other means than the common blandishments of a lover, to induce the girl to elope with and marry him. (3) And so, where the defendant went in the night to the girl's father's house, and placed a ladder against her window, and held it for her to descend, which she did, and eloped with him, this was held to be a "taking out of the possession of her father," although the girl herself had proposed the plan to the defendant. (4)

Where, in another case the girl was persuaded by the defendant to go away with him from her father's house, without her father's consent, and she accordingly left home by a pre-arrangement between them and went and met the prisoner at an appointed place, without any intention of going back to her father, this was held to be a taking of the girl out of her father's possession since up to the time of her meeting with the defendant, as appointed, she had not yet absolutely renounced her father's protection, and was still in his constructive possession. (5)

The defendant, by arrangement with the girl, met her and stayed with her away from her father's house for several nights, sleeping with her: the jury found that the father did not consent to this, and that the defendant knew he did not; and they also found that he took the girl away with him in order to gratify his passions and with the intention of then letting her go home, and not with any intention of keeping her from her home permanently; and the conviction under these circumstances was held right. (6)

The defendant, by promises, induced a girl to leave her father's house and live with him; and it was held that he could be convicted, under this law, although not actually present or assisting the girl when she left her father's roof. (7)

A girl who is employed as a barmaid at a distance from her father's house is under the lawful charge of her employer and not in the possession of her father, and, therefore, an indictment will not be for taking her out of her father's possession. (8)

A., a girl under sixteen, who, with her father's consent, was under the care of B., her uncle, was allowed, by B., to dine at the house of C., the husband of B's sister. C. took A. for a drive and stayed over night with her, at a hotel, where he debauched her. The next day he left her at B's. *Held*, that B. had the lawful care of A., and that she was unlawfully taken out of his possession by C. (9)

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(1) R. v. Primelt, 1 F. & F. 50.

(2) R. v. Robins, 1 C. & K. 456; R. v. Booth, 12 Cox, 231; R. v. Prince, L. R., 2 C. C. R., 154; 44 L. J. (M C.) 122. See full references to Reg. v. Prince, in remarks of Wills, and Cave, JJ., in the case of Reg. v. Tolson, *ante* pp. 206 and 207.

(3) R. v. Kipps, 4 Cox, 167; R. v. Booth, 12 Cox, 231; R. v. Tursleton, 1 Lev. 257; 1 Sid. 387; 2 Keb. 32.

(4) R. v. Robins, 1 C. & K. 456.

(5) R. v. Mankleton, Dears. 159; 22 L. J. (M. C.), 115.

(6) R. v. Timmins, Bell, 276; 30 L. J. (M. C.) 45.

(7) R. v. Robb, 4 F. & F. 59; Arch. Cr. Pl. & Ev. 21 Ed. 805.

(8) R. v. Henkers, 16 Cox, 257; Arch. Cr. Pl. & Ev. 21 Ed. 806.

(9) R. v. Mondelet, 21 L. C. J. 154; Bur. Dig. 258.

284. Stealing children under fourteen.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who *with intent to deprive* any parent or guardian, or other person having the lawful charge, of any child, *under* the age of *fourteen* years, of the possession of such child, *or with intent to steal any article* about or on the person of such child, unlawfully—

(*a.*) *takes* or *entices* away *or detains* any such child ; or

(*b.*) *receives* or *harbours* any such child *knowing* it to have been dealt with as aforesaid.

2. Nothing in this section shall extend to any one who gets possession of any child, claiming in good faith a right to the possession of the child. R.S.C., c. 162, s. 45.

The English statute, (24–25 Vic., c. 100, s. 56), has the words "by force or fraud, lead or take away, or decoy or entice away," as well as the words "receives or harbors." Except for the difference thus indicated this article is the same in effect as the English statute.

In an English case, a woman, was held rightly convicted, upon evidence that the child, having been placed by its mother in the prisoners' service, was afterwards missing, and could not be discovered, and that the woman had given different accounts of what had become of the child, but implying that she had given her up to some third party, although there was no evidence that she still had possession of the child, nor indeed any evidence of where it was. (1)

In an American case it was held that, where a wife separates from and leaves her husband, taking her two-year-old child, and is assisted, in leaving her husband, by another person, and the child, after such separation, continues to be in the custody and under the control of the wife,—the person so assisting her to leave her husband is not guilty, of unlawfully taking and carrying away the infant child, which the mother continues to retain in her care and possession (2).

In another American case it was held, by the Pennsylvania Supreme Court, that under a law of that state, inflicting a penalty for taking or decoying a child under ten years of age, with intent to deprive its parents or guardian of its possession or with intent to steal any article of value about its person, an indictment, omitting these essential ingredients of the offence, was fatally defective ; and that an agreement between a father nad other persons to get peaceable possession of his child is not a criminal conspiracy where unlawful means are agreed on or used to accomplish their purpose. The defendants in that case, Ira Myers and his mother were charged with having, with others, conspired to kidnap, decoy and carry away a child under the control and authority of Jesse Myers, and for having, in pursuance of such conspiracy, taken the child from her possession. The defects which the Court found in the indictment were among others, that, it did not allege that the child was under ten years of age, nor that the accused intended to deprive its parents or other persons in lawful charge of the child of the possession, nor to steal any article about its person ; but in turning, from the defects in the indictment, to the proof offered in support of the charge, the Court found the accused Ira Myers to be the father of the child, and that the other persons assisted him in obtaining, without violence or a breach of the peace, the possession of it ; but it was contended for the prosecution that the agreement to assist in taking possession of the child constituted a conspiracy. The Court, however held that, as the father could lawfully take

(1) R. v. Johnson, 15 Cox, C. C. R., 481.
(2) State v. Angel, (Kan. Supr. Ct.), 11 Cr. L. Mag. 788.

peaceable possession of his own child it was no offence to agree to aid him in doing so, there being no unlawful means agreed upon or used to accomplish their purpose (1).

PART XXIII.

DEFAMATORY LIBEL.

285. **Definition.**—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 to whom it is published.

2. Such matter may be expressed either in words legibly marked upon any substance whatever, or by any object signifying such matter otherwise than by words, and may be expressed either directly or by insinuation or irony.

286. Publishing a libel is exhibiting it in public, or causing it to be read or seen, showing or delivering it or causing it to be shown or delivered, with a view to its being read or seen by the person defamed or by any other person.

Article 285 contains the same definition of libel as that contained in section 227 of the English Draft Code, the only difference being that the latter has the word "*calculated*" in place of the word "*likely*" appearing above in italics; and, with the exception of a few variations, mostly verbal, the whole of the articles, (except article 291), of this part, down to and including article 302, *post*, are identical with the corresponding sections of the English Draft Code. With regard to their definition of libel, the Royal Commissioners say, in a marginal note, that it is "the existing law, the criminality of libel depending upon its tendency to produce a breach of the peace"; and, in another note, they say, in reference to privileged communications, that, "Sections 229 to 237, inclusive, (corresponding with our articles 287, 288, 289, 290, 292, 293, 294, 295 and 296), are believed to declare the existing common law as to what constitutes a privileged communication"; but that "there has been a diversity of judicial opinion upon this subject."

It will be seen, by the second clause of article 285, that the libellous matter may be, either by words legibly marked, that is, written or printed, etc., on any substance, (such as, for instance, paper, parchment, linen, wood, copper, glass, stone, etc.), or by any object signifying any such matter, in some other way than by words, (as, for instance, by a model, a statue, (2) an effigy, (3), etc., or by a picture, a drawing, a sketch, a painting, (4) an engraving, a photograph, etc., or by fixing up a gallows against a man's door. (5)

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(1) C. v. Myers, S. C., 23 Atl. Rep. 164; 14 Cr. L. Mag. 252.
(2) Hawk. P. C. 542.
(3) Eyre v. Garlick, 42 J. P. 68.
(4) Austin v. Culpepper, 2 Show. 313; Du Bost v. Beresford, 2 Camp. 511.
(5) Hawk. P. C. 542.

PRIVILEGED PUBLICATIONS AND COMMUNICATIONS.

287. Publication on invitation or provocation.—No one commits an offence by publishing defamatory matter on the invitation or challenge of the person defamed thereby, nor if it is necessary to publish such defamatory matter in order to refute some other defamatory statement published by that person concerning the alleged offender, if such defamatory matter is believed to be true, and is relevant to the invitation, challenge or the required refutation and the publishing does not in manner or extent exceed what is reasonably sufficient for the occasion.

This article provides that a defamatory publication shall be no offence,—1, when it is published by invitation or challenge from the person defamed, or, 2, when it is a necessary refutation of a previously published defamatory statement.

Invited or challenged publications.—It would hardly be proper to punish communications procured by the complainant's own contrivance and request. If the only publication that can be proved is one made by the defendant in response to an application from the complainant or one of his agents or some one acting on his behalf, demanding an explanation, it seems only right that the answer, if fair and relevant, should be privileged. But this rule does not apply when there has been a previous unprivileged publication, by the defendant, of the same libel which causes or leads to enquiry by the party defamed; for, in that case, it is the defendant himself who has brought on the enquiry.

If there are rumors afloat prejudicial to a man's character and he endeavours to trace them to their source, all statements made *bonâ fide* to him or any agent of his, in the course of such an investigation, are rightly protected. But it makes a great difference if the rumors originated with the defendant, so that what he has, himself, previously circulated produces the enquiry: and if, on being applied to, he acknowledges having originated the rumors and persists in and repeats the libellous or defamatory matter, or asserts his belief in it, the repitition will not be privileged, although thus elicited by the person defamed. (1)

ILLUSTRATIONS.

A., a servant knowing the character which B., his master would give him, procured C., to write a letter to B., in order to obtain from the latter an answer upon which to ground proceedings for libel. *Held*, that such proceedings could not be maintained. (2)

A witness, (an agent of the plaintiff's), hearing that the defendant had a copy of a libellous print, went to defendant's house, and asked to see it: the defendant thereupon produced it, and pointed out the figure of the plaintiff and the other persons caricatured. Lord Ellenbrough nonsuited the plaintiff, as there was no other publication proved. (3)

A., discharged B. his servant, and when applied to, by another gentleman, gave him a bad character. B.'s brother-in-law, C., thereupon repeatedly called on A., to inquire why he had dismissed B; and at last A. wrote to C., stating his reasons specifically. B. sued out a writ the same day the letter was written.

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(1) Smith v. Mathers, 1 Moo. & Rob. 151; Griffiths, v. Lewis, 7 Q. B. 61; 14 L. J. (Q. B.) 199; Richards v. Richards, 2 Moo. & Rob. 557; Force v. Warren, 15 C. B. (N. S.) 806.

(2) King, v. Waring & Ux., 5 Esp. 15.

(3) Smith v. Wood, 3 Camp. 323

Held by Lord Mansfield, C. J., and Butler, J., that no action lay on such letter, as A. was evidently entrapped into writing it. (1)

A friend of the plaintiff's asked defendant to act as arbitrator between the plaintiff and A., in a dispute about a horse. Defendant declined. The friend wrote again strongly urging defendant to use his influence with A., not to bring the case into court. Defendant again declined, and stated his reasons; and on this letter plaintiff brought an action. Subsequently another friend of the plaintiff's, with his knowledge and consent, wrote to defendant that she was confident he was misinformed about the plaintiff. Defendant replied that he believed A., and his servant, and not the plaintiff. On this plaintiff brought a second action of libel. *Held*, that both letters were privileged. (2)

The plaintiff was a builder, and contracted to build certain school-rooms at Bermondsey. The defendant started a false report that in the building the plaintiff had used inferior timber; the report reached the plaintiff, who thereupon suspended the work, and demanded an inquiry; and the committee of the school employed defendant to survey the work and report. He reported falsely that inferior timber was used. Lord Lyndhurst directed the jury, that if they believed that the reports which produced the inquiry originated with the defendant, the defendant's report to the committee was not privileged. Verdict for the plaintiff. (3)

Provoked publication.—If a person is attacked in a newspaper, he may write back to rebut the charges made against him and may retort upon his assailant, when such retort is a necessary part of his defence, or fairly arises out of the charges made against him. (4). The privilege, however, extends only to such retorts as are a fair answer to the assailant's attacks.

ILLUSTRATIONS.

The plaintiff, a barrister, attacked the Bishop of Sodor and Man before the House of Keys in an argument against a private bill, imputing to the bishop improper motives in his exercise of church patronage. The bishop wrote a charge to his clergy refuting these insinuations, and sent it to the newspapers for publication. *Held*, that under the circumstances the bishop was justified in sending the charge to the newspapers, for an attack made in public required a public answer. (5)

The defendant was a candidate for the county of Waterford. Shortly before the election the Kilkenny Tenant Farmer's Association published in *Freeman's Journal* an address to the constituency, describing the defendant as "a true type of a bad Irish landlord—the scourge of the country," and charging him with tyranny and oppression towards his tenants, and especially towards the plaintiff, one of his former tenants. The defendant thereupon published also in *Freeman's Journal* an address to the constituency, answering these charges, and, in so doing, necessarily libelled the plaintiff. *Held*, that such an address, being an answer to an attack, was *primâ facie* privileged. (6)

The plaintiff, a policy-holder in an insurance company, published a pamphlet accusing the directors of fraud. The directors published a pamphlet in reply,

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(1) Weatherston v. Hawkins, 1 T. R. 110; See also Taylor v. Hawkins, 16 Q. B. 308; 20 L. J. Q. B 313; R. v. Hart, 1 Wm. Black. 386.

(2) Whitely v. Adams, 15 C. B. N. S. 392; 32 L. J. C P. 89; 10 Jur. N. B. 470; 12 W. R. 153; 9 L. T. 483.

(3) Smith v. Mathews, 2 Moo. & Rob. 151.

(4) O'Donoghue v. Hussey, Jr. R. 5 C. L. 124.

(5) Laughton v. Bishop of Sodor and Man, L. R. 4 P. C. 495; 42 L. J. P. C. 11; 9 Moore, P. C. C. N. S. 318; 21 W. R. 204; 28 L. T. 377. See Hibbs v. Wilkinson, 1 F. & F. 608.

(6) Dwyer v. Esmonde, 2 L. R. (Ir.) 243, reversing the decision of the Court below; Ir. R. 11 C. L. 542.

declaring the charges contained in the plaintiff's pamphlet to be false and calumnious, and also asserting that in a suit he had instituted he had sworn, in support of these charges, the opposite of his own handwriting. Cockburn, C. J., held the director's pamphlet *primâ facie* privileged, and directed the jury as follows: "If you are of opinion that it was published *bonâ fide* in defence of the company, and to prevent these charges from operating to their prejudice, and to vindicate the character of the directors, and not with a view to injure or lower the character of the plaintiff, and think that the publication did not go beyond the occasion, you ought to find for the defendants on the general issue." Verdict for defendants. (1)

A., the manager of a private lunatic asylum, unsuccessfully attempted to seize and carry off B., a lady, whom he *bonâ fide* believed to be insane. He did so at the request of her husband, proper certificates having been obtained and all the requirements of the Lunacy Act complied with. B, who was perfectly sane, constantly afterwards attacked A. in the newspapers, challenging him to justify his conduct. A., at last, wrote a letter in answer to these attacks and sent it to the *British Medical Journal*: Huddleston, B., held this letter privileged. (2)

At a vestry meeting called to elect fresh overseers, A. accused B., one of the outgoing overseers, of neglecting the interests of the vestry, and not collecting the rates; B. retorted that A. had been bribed by a railway company. *Held* that the retort was a mere *tu quoque*, in no way connected with the charge made against B. by A., and was therefore not privileged; for it was not made in self-defence, but in counter-attack. (3)

288. Publishing in Courts of Justice.—No one commits an offence by publishing any defamatory matter, in any proceeding held before or under the authority of any court exercising judicial authority, or in any inquiry made under the authority of any statute or by order of Her Majesty, or of any of the departments of Government, Dominion or provincial.

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.

With regard to the publication of parliamentary documents article 705, *post*, contains the following provision :—

"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."

(1) Kenig v. Ritchie, 3 F. & F. 413; R. v. Veley, 4 F. & F. 1117.
(2) Weldon v. Winslow, *Times* for March 14th—19th, 1884; Coward v Wellington, 7 C. & P. 531.
(3) Senior v. Medland, 4 Jur. N. S. 1039. And see Huntley v. Ward, 6 C. B. N. S. 514; 6 Jur. N. S. 18; 1 F. & F. 552.

In connection with the same subject, sections 6 & 7 of the R.S.C., chap. 163, remain unrepealed, (See Schedule Two, *post*), and are as follows :—

"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.

"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 commts an offence by publishing in good faith, for the information of the public, a fair report of the proceedings of the Senate or House of Commons, or any committee thereof, or of any such Council or Assembly, or any committee thereof, or of the public proceedings *preliminary* or *final* heard before any court exercising judicial authority, nor by publishing, in good faith, any fair comment upon any such proceedings.

The rule embodied in this article applies to all courts of justice, superior or inferior, of record, or not of record. (1) It is immaterial whether the proceeding be *ex parte*, or not; and recent decisions in England,—where the law, as to reports of proceedings in courts of justice, is not, even now, under the latest statutory amendment made by the 51-52 Vict. c. 64, s. 3, so wide as ours, as now expressed in the above article,—shew that it is also immaterial whether the matter be one over which the court has jurisdiction or not.

Formerly, the law was not construed so as to privilege reports of proceedings (especially when *ex parte*) before police magistrates or justices of the peace; and many judges, by their *dicta* denied any privilege to fair and accurate reports of *ex parte* proceedings, even in the superior courts (2); but a different view was afterwards taken by such judges as Cockburn, C. J., (3) and Lawrence, J., (4) who saw a good reason for such a privilege in the fact that "the general advantage to the country of having the proceedings of all courts of justice made public more than counterbalances the inconvenience to private persons, whose conduct may be the subject of such proceedings."

(1) Lewis v. Levy, E. B. & E. 537; 27 L. J., Q. B., 287.

(2) Maule, J., in Hoare v. Silverlock, 9 C. B. 23; 19 L. J. C. P., 215; and Abbott, C. J., in Duncan v. Thwaites, 3 B. & C. 556; 5 D. & R. 547.

(3) In Wason v. Walter, L. R. 4 Q. B. 87; 8 B. & S. 730; 38 L. J., Q. B. 34, 44; 17 W. R. 169; 19 L. T. 418.

(4) In R. v. Wright, 8 T. R. 298.

In the course of his remarks in the case of Wason v. Walter (1) Cockburn, C. J., said. "Even in quite recent days judges in holding the publication of the proceedings of courts of justice lawful have thought it necessary to distinguish what are called *ex parte* proceedings as a possible exception from the operation of the rule. Yet *ex parte* proceedings before magistrates, and even before this court, as for instance, on applications for criminial informations, are published every day; but such a thing as an action or indictment founded on a report of such an *ex parte* proceeding is unheard of, and if any such action or indictment should be brought, it would be held that the true criterion of the privilege is not whether the report was or was not of a proceeding *ex parte*, but whether it was a fair and honest report of what had taken place, published simply with a view to the information of the public, and innocent of all intention to do injury to the reputation of the party affected."

It was not until 1878 that the law became settled, by the decision in Usill's case in which it was held that the privilege extended to all *bonâ fide* and correct reports of all proceedings in a magistrate's court, whether *ex parte* or otherwise.

Usill's case arose out of an item, which appeared in three London newspapers, —the *Daily News*, the *Standard* and the *Morning Advertiser*, in the following words:—

"Three gentlemen, civil engineers, were among the applicants to the magistrate yesterday, and they applied for criminal process against Mr. Usill, a civil engineer of Great Queen Street, Westminster. The spokesman stated that they had been engaged in the survey of an Irish railway by Mr. Usill, and had not been paid what they had earned in their various capacities, although from time to time they had received small sums on account; and, as the person complained of had been paid, they considered that he had been guilty of a criminal offence in withholding their money. Mr. Woolrych said it was a matter of contract between the parties; and although, on the face of the application they had been badly treated, he must refer them to the County Court."

Mr. Usill brought a civil action against the proprietor of each of these newspapers, and the three actions were tried together before Cockburn, C. J., at Westminster, on November 15th, 1877. The learned judge told the jury that the only question for their consideration was whether or not the publication complained of was a fair and impartial report of what took place before the magistrate; and that, if they found that it was so, the publication was privileged. The jury found that it was a fair report of what occurred, and accordingly returned a verdict for the defendant in each case. *Held*, that the report was privileged, although the proceedings were *ex parte*, and although the magistrate decided that he had no jurisdiction over the matter. (2)

In Usill's case Lord Coleridge (who quoted and referred, approvingly, to the remarks of Cockburn, C. J., in Wason v. Walter), made a distinction between "*inherent* want of jurisdiction on account of the nature of the complaint," and "what may be called *resulting* want of jurisdiction because the facts do not make out the charge": (3) and, – assuming that the application made before the magistrate was for a summons or order under the Masters and Workmen's Act, that is, an application which the magistrate would have had jurisdiction to grant, had the facts when investigated proved to warrant such a course,— His Lordship arrived at the conclusion that the magistrate had jurisdiction to listen to the applicant until the facts stated to him made it clear that he had no power to grant the redress applied for.

There is no doubt that it was the Magistrate's duty to listen to the applicant until it became clear from his statement of the facts that the subject matter of the complaint was not within the magistrate's jurisdiction. But it is the magistrate's duty to listen thus far to every applicant; and it can hardly be expected that an

(1) Wason v. Walter, L. R., 4 Q. B. 94.
(2) Usill v. Hales, Usill v. Breasley, and Usill v. Clarke, 3 C. P. D., 206; 47 L. J. (C. P.) 323, 380; 26 W. R. 371; 38 L. T. 65; 14 Cox, 61.
(3) 3 C. P. D. p. 324.

ordinary newspaper reporter will be able to accurately distinguish between a magistrate's *inherent* want of jurisdiction and that want or absence of jurisdiction which is *merely resulting*.

Since the decision in the Usill case the Imperial Statute, 51-52 Vict., c. 64, s. 1, has been passed declaring that a fair and accurate report, in any newspaper, of proceedings publicly heard before any Court exercising judicial authority shall, if published contemporaneously with such proceedings, be privileged; but our article, 290, expressly includes both *preliminary* and *final* proceedings.

291. Fair reports of public meetings.—No one commits an offence by publishing in good faith, in a newspaper, a fair report of the proceedings of any public meeting if the meeting is lawfully convened for a lawful purpose and open to the public, and if such report is fair and accurate, and if the publication of the matter complained of is for the public benefit, and if the defendant does not refuse to insert in a conspicuous place in the newspaper in which the report appeared a reasonable letter or document of explanation or contradiction by or on behalf of the prosecutor.

The provision contained in this article is not contained in the English Draft Code.

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.

293. Fair comment.—No one commits an offence by publishing fair comments upon the public conduct of a person who takes part in public affairs.

2. No one commits an offence by publishing fair comments on any published book or other literary production, or any composition or work of art or performance publicly exhibited, or any other communication made to the public on any subject, if such comments are confined to criticism on such book or literary production, composition, work of art, performance or communication.

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.

Reports of public meetings.—It will be seen by article 291 that, in order for the report of the proceedings of a public meeting to be privileged, not only must the meeting be one open to the public, but the matter reported and published, as an account of what has taken place at such public meeting, must be matter which is of public concern, and the publication of which is for the public benefit. This is only right, for it would be a very serious matter to privilege the reproduction, in public print of everything of a private nature, or

anything not of public interest spoken, at a meeting, of and injurious to the reputation of individuals. A meeting may be thinly attended, or the audience may know the speaker who utters the slanderous words at such meeting to be unworthy of credit, and may not believe what he says. But it would be a terrible thing for the person defamed if such words could be printed and published to all the world, merely because they were uttered at a meeting. Charges recklessly made in the excitement of the moment might thus be diffused throughout the country, and would remain recorded in a permanent form against a perfectly innocent person. We cannot tell into whose hands a copy of that newspaper may come. Moreover, additional importance and weight is given to such a calumny by its republication in the columns of a respectable paper. Many people will believe it merely because it is in print. If the report is to be spread over the world by means of the press, the malignant falsehoods of the vilest of mankind, which would not receive the least credit where the author is known, would make an impression which it would require much time and trouble to erase, and which it might be difficult, if not impossible, ever completely to remove. (1)

Article 291 is to the same effect as was section 2, (now repealed), of the Imperial Statute 44 & 45 Vic. c. 60, (the *Newspaper Libel and Registration Act*, 1881). The present English law on the subject is contained in sec 4 of the *Law of Libel Amendment Act*, 1888, which is as follows:

"A fair and accurate report published in any news paper of the proceedings of a public meeting, or, (except where neither the public nor any news paper reporter is admitted), of any meeting of a vestry, town council, school board, board of guardians, board or local authority formed or constituted under the provision of any act of parliament, or of any committee appointed by any of the above mentioned bodies, or of any meeting of any commissioners authorised to act by letters-patent, Act of Parliament, warrant under the Royal Sign Manual, or other lawful warrant or authority, select committees of either House of Parliament, justices of the peace in quarter sessions assembled for administrative or deliberative purposes, and the publication at the request of any government office or department, officer of state, commissioner of police, or chief constable, of any notice or report issued by them for the information of the public, shall be privileged unless it shall be proved that such report or publication was published or made maliciously: Provided that nothing in this section shall authorise the publication of any blasphemous or indecent matter: Provided also, that the protection intended to be afforded by this section shall not be available as a defence in any proceedings if it shall be proved that the defendant has been requested to insert in the newspaper in which the report or other publication complained of appeared, a reasonable letter or statement, by way of contradiction or explanation of such report or other publication, and has refused or neglected to insert the same: Provided, further, that nothing in this section contained shall be deemed or construed to limit or abridge any privilege now by law existing, or to protect the publication of any matter not of public concern and the publication of which is not for the public benefit.

"For the purposes of this section *public meeting* shall mean any meeting *bonâ fide* and lawfully held for a lawful purpose, and for the furtherance or discussion of any matter of public concern, whether the admission thereto be general or restricted."

Fair comment.—We have seen, already, (2) that,—side by side with the gradual development and advance of broader popular views and sentiments,—corresponding changes and improvements, in the general law of libel, have been effected, partly by express legislation on that subject, (3) and partly by the tacit

(1) See Remarks of Lord Campbell in Davison v. Duncan, 7 E. & B. 231; 26 L. J., Q. B., 106; 3 Jur. N. S. 613; 5 W. R. 253; 28 L. T. (Old S.) 265; and of Best, C. J., in De Crespigny v. Wellesley, 5 Bing. 402–406.

(2) See comments at pp. 67, 68, and 69, *ante*, upon article 124.

(3) Fox's Libel Act, 1792, (32 Geo. 3, c. 60); Lord Campbell's Act, (6-7 Vict., c. 96); 37 Vic., c. 38; R. S. C., c. 163; *The Newspaper Libel and Registration Act*, 1881, (Imp.); *The Law of Libel Amendment Act*, 1888, (Imp.).

establishment and judicial recognition of the modern rule or right of fair comment; so that the old idea of libel,—written blame, *true* or *false* of any man *public* or *private*,—which held firm possession of the judicial mind, a hundred years age, has long since been relegated to a place among the things of the past, and has given way to the more modern, common sense doctrine which allows, to every man, the right to give free and honest expression to his views on matters of public interest and general concern.

In the words of Cockburn, C. J.,—"Our law of libel has, in many respects, only gradually developed itself into anything like a satisfactory and settled form. The full liberty of public writters to comment on the conduct and motives of public men has only in very recent times been recognized. Comments on government, on ministers and officers of state, on members of both Houses of Parliament, on judges and other public functionaries, are now made every day, which half a century ago would have been the subject of actions or *ex officio* informations, and would have brought down fine and imprisonment on publishers and authors. Yet who can doubt that the public are gainers by the change, and that, though injustice may often be done, and though public men may often have to smart under the keen sense of wrong inflicted by hostile criticism, the nation profits by public opinion being thus freely brought to bear on the discharge of public duties?" (1)

The real ground upon which the right of fair and honest comment and criticism rests is not, in a strictly legal sense, that of the matter being privileged by reason of the occasion, but that honest criticism is no libel; in other words, when anything defamatory is used in the course of any criticism, it is no longer criticism, so far as the defamatory part of it is concerned.

Odgers points out that true criticism differs from defamation in the following particulars:—

"1. Criticism deals only with such things as invite public attention, or call for public comment. It does not follow a public man into his private life, or pry into his domestic concerns.

2. Criticism never attacks the individual, but only his *work*. Such work may be either the policy of a government, the action of a member of parliament, a public entertainment, a book published, or a picture exhibited. In every case the attack is on a man's *acts*, or on some *thing* and not upon the man himself. A true critic never indulges in personalities, but confines himself entirely to the subject matter of his criticism.

3. True criticism never imputes or insinuates dishonourable motives (unless justice absolutely requires it, and then only on the clearest proofs).

4. The critic never takes advantage of the occasion to gratify private malice, or to attain any other object beyond the fair discussion of matters of public interest, and the judicious guidance of the public taste. He will carefully examine the production before him, and then honestly and fearlessly state his true opinion of it." (2)

"Every one has a right to publish such fair and candid criticism, even "although the author may suffer loss from it. Such a loss the law does not consider as an injury, because it is a loss which the party ought to sustain. It is, in short, the loss of fame and profits to which he was never entitled. * * * Reflection upon personal character is another thing. Show me an attack upon the moral character of the plaintiff, or any attack upon his character unconnected with his authorship, and I should be as ready as any judge who ever sat here to protect him. But, I cannot hear of malice on account of turning his works into ridicule." (3)

"Liberty of criticism must be allowed, or we should neither have purity of taste nor of morals. Fair discussion is essentially necessary to the truth of

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(1) Chief Justice Cockburn's Rem. in Wason v. Walter, L. R. 4 Q. B., 93, 94.
(2) Odgers' Lib. & Sl. 34.
(3) Rem. of Lord Ellenborough, in the celebrated case of Sir John Carr. v. Hood, 1 Camp. 355 *n*.

history and the advancement of science. That publication, therefore, I shall never consider as a libel, which has for its object, not to injure the reputation of any individual, but to correct misrepresentations of fact, to refute sophistical reasoning, to expose a vicious taste in literature, or to censure what is hostile to morality." (1)

But "A critic must confine himself to criticism, and not make it the veil for personal censure, nor allow himself to run into reckless and unfair attacks merely from the love of exercising his power of denunciation." (2)

Comment on well-known facts, or facts, which are admitted to exist is a very different thing from asserting as a fact, something which is unsubstantiated, and then commenting upon the thing so asserted and unsubstantiated.

The very statement of the rule as to fair and *bonâ fide* comment on a matter of public interest assumes that the matters commented upon have been, some how or other, ascertained to be actual facts It does not mean that a man may invent something, and then proceed to comment upon it, in what would be a fair and *bonâ fide* manner, if the thing were actually a fact well known or admitted.

It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to make the bare assertion that he has been guilty of particular acts of misconduct.

Although the right to comment upon the public acts of public men is not the peculiar privilege of the press, but the right of citizens generally, and although, in strict law, newspaper writers stand in no better position than any other person, still they are usually allowed greater latitude by juries ; for, in a great measure, the duty of watching narrowly the conduct of government officials and the working of all public institutions, and of commenting freely on all matters of general concern to the nation, and of fearlessly exposing abuses, is a duty which has come to be looked upon, by the public at large, as one within the peculiar province of the press.

Odgers also points out that "*Comment* and *criticism* on matters of public interest stand on a very different footing from *reports* of judicial or Parliamentary proceedings. Such reports are privileged, so long as they are fair and accurate *reports*, and nothing more. But so soon as there is any attempt at *comment*, the privilege is lost. In short, report and comment are two distinct and separate things. A report is the mechanical reproduction, more or less condensed or abridged, of what actually took place : comment is the judgment passed, on the circumstances reported, by one who has applied his mind to them. *Fair reports* are *privileged* publications ; while *fair comments*, if on matters of public interest, are, as such, *no libels at all*." (3)

ILLUSTRATIONS.

A newspaper is entitled to comment upon the hearing of a criminal charge and the evidence produced thereat, and discuss the conduct of the magistrates in dismissing the charge without hearing all the evidence ; but not to disclose "*evidence which might have been adduced*" and argue therefrom that the accused was guilty of the felony. (4)

A. and B. owned the *Natal Witness*, in which they attacked the official conduct of C. the British Resident Commissioner in Zululand, asserting that he had

(1) Lord Ellenborough, in Tabart v. Tipper, 1 Camp. 351.
(2) Per Huddleston, B., in Whistler v. Ruskin Times for Nov. 27th., 1878.
(3) Odgers, Lib. & Sl. 36.
(4) Hibbins v. Lee, 4 F. & F. 243 ; 11 L. T. 541.
Helsham v. Blackwood, 11 C. B. 111 ; 20 L. J. C. P. 187 ; 15 Jur. 861.
R. v. White and another, 1 Camp, 359.

violently assaulted a Zulu chief, that he had set on his native police to assault and abuse others, &c. They declared that though doubt had been thrown on these stories they would prove to be true on investigation. They then proceeded, on the assumption that the charges were true, to comment on C.'s conduct in offensive and injurious language. At the trial, it was proved that the charges were without foundation; and A. and B. made no attempt to support them by evidence. Verdict for £500. Motion for a new trial refused by Supreme Court of Natal. *Held*, on appeal to Privy Council that the distinction must be closely drawn between comment or criticism, and allegations of fact; and that the publication was in no way privileged. (1)

A newspaper reported that the mother of a lady, dead and buried, had applied to the coroner, on affidavits that the body might be exhumed, and proceeded to give a sensational narrative of shocking acts of cruelty to the deceased committed by her husband, imputing that he had caused her death. This narrative commenced—"From inquiries made by our reporter it appears," &c. In reality the reporter had made no inquiries; he had merely read the affidavits, and accepted the *ex parte* statements contained in them as truth: they were in fact wholly false. He was convicted and fined £50. (2)

A Dublin newspaper asserted that plaintiff, the manager of the Queen's Printing Office in Ireland, had corruptly supplied *Freeman's Journal* with official information and surreptitious copies of official documents. A plea of fair comment, stating that *Freeman's Journal* did somehow get official information earlier than other papers, and that defendant *bonâ fide* believed that such information could only have been obtained from the Queen's Printing Office, was held bad on demurrer. (3)

It is not a fair comment on any legal proceedings to insinuate that a particular witness committed perjury in the course of them. (4)

A., in "A History of New Zealand," stated that B., a cavalry lieutenant, had charged at some women and children who were harmlessly hunting pigs, "and cut them down gleefully and with ease"; that he had dismissed a subordinate officer who protested against this cruelty, and that he was known among the Maoris as "Kohuru" (the murderer). A., admitted that these facts did not appear in official reports, or in any other history of New Zealand; but he called a witness who had made a statement to the Governor of New Zealand on hearsay evidence, containing the same charge, a copy of which statement the Governor had forwarded to A. *Held*, no defence. Verdict £5,000, damages. (5)

Matters of public interest.—Among matters of public interest Odgers mentions the following:

1. *Affairs of State*: (including the policy, foreign or domestic, of the government, the conduct of public servants, all suggestions of reforms in existing laws, all bills before parliament, the adjustment and collection of taxes, etc.)
2. *The administrstion of justice*; (including the conduct of suitors and witnesses, the verdicts of juries, etc., but on these, during the progress of a trial there should be nothing beyond simple reports, and no comments until after the trial is ended.)

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(1) Davis & Sons v. Shepstone, 11 App. Cas. 187; 55 L. J. P. C. 51; 34 W. R. 722; 55 L. T. 1; 50 J. P. 709.
See Walker v. Brogden, 19 C. B. N. S. 65; 11 Jur. N. S. 671; 13 W. R. 809; 12 L. T. 495 and, also Duplany v. Davis, 3 Times L. R. 184.
(2) R. v. Andrew Gray, 26 J. P. 663.
(3) Lefroy v. Burnside, (No. 2), 4 L R. Ir. 557.
(4) Roberts v. Brown, 10 Bing. 519; 4 Moo. & S. 407.
Littler v. Thompson, 2 Beav. 129.
(5) Bryce v. Rusden, 2 Times L. R. 435; See also Brenon v. Ridgway, 3 Times L. R. 592.

3. *Public institutions and local authorities;* (including town councils, school boards, boards of health, vestries, hospitals, colleges, asylums, etc.)
4. *Ecclesiastical affairs;* (including a bishop's government of his diocese, a rector's management of his parish, etc.)
5. *Books, pictures and architecture.*
6. *Theatres, concerts and other public entertainments.*

ILLUSTRATION.

Condemnation of the foreign policy of the Government, however sweeping, is no libel.

The evidence before a Royal Commission is matter *publici juris*, and everyone has a perfect right to criticise it. (1)

So is evidence taken before a Parliamentary Committee on a local gas bill. (2)

A report of the Board of Admiralty upon the plans of a naval architect, submitted to the Lords of the Admiralty for their consideration, is a matter of national interest. (3)

All appointments by the Government to any office are matters of public concern. (4)

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. (5)

A meeting assembled to hear a political address by a candidate at a Parliamentary election, and the conduct thereat of all persons who take any part in such meeting, are fair subjects for *bonâ fide* discussion by a writer in a public newspaper. (6)

The details of a long-protracted squabble between a professional singer and a great composer do not become matters of public interest, merely because the former ultimately applies to a police magistrate for a summons against the latter. (7)

"The management of the poor and the administration of the poor-law in each local district are matters of public interest." (8)

The official conduct of a way-warden may be freely criticised in the local press. (9)

The manner in which a coroner's officer treats a deceased's poor relatives when serving them with a summons for an inquest, and the behaviour of such officer in court are matters of public concern. (10)

The conduct of a trustee of a private corporation, as such trustee, is not a matter of public interest. (11)

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(1) Per Wickens, V. C, in Mulkern v. Ward, L. R. 13 Eq. 622; 41 L. J., Ch. 464; 26 L. T. 831.
(2) Hedley v. Barlow, 4 F. & F. 224.
(3) Henwood v. Harrison, L. R. 7 C. P. 606; 41 L. J. C. P. 206; 20 W. R. 1000; 26 L. T. 938.
(4) Seymour v Butterworth, 3 F. & F. 372.
(5) Wilson v. Reed and others, 2 F. & F. 149.
(6) Davis v. Duncan, L. R. 9 C. P. 396; 43 L. J. C. P. 185; 22 W. R. 575; 30 L. T. 464.
(7) Weldon v. Johnson, *Times* for May 27th, 1884.
(8) Per Cockburn, C. J., in Purcell v. Sowler, 2 C. P. D. 218; 46 L. J. C. P. 308; 25 W. R. 362; 36 L. T. 416.
(9) Harle v. Catherall, 14 L. T. 801.
(10) Per Bowen, J, in Sheppard v. Lloyd, *Daily Chronicle* for March 11, 1882.
(11) Wilson v. Fitch, 41 Cal. 363.

The press may comment on the fact of the incumbent of a parish having, contrary to the wishes of the church-warden, allowed books to be sold in church during service, and cooked a chop in the vestry after service. (1)

The court were equally divided on the question whether sermons preached in open church, but not printed and published, were matter for public comment. (2) *Quaere*, would it not depend upon whether or not the sermon itself dealt with matters of public interest?

The articles which appear in a newspaper and its general tone and style may be the subject of adverse criticism, as well as any other literary production; but no attack should be made on the private character of a writer on its staff. (3)

A comic picture of the author of a book, *as author*, bowing beneath the weight of his volume, is no libel; though a personal caricature of him as he appeared in private life would be. (4)

Criticism, however trenchant, on any new poem or novel, or on any picture exhibited in a public gallery, is no libel. (5)

But to maliciously pry into the private life of any poet, novelist, artist, or statesman, is indefensible.

A gentleman unconnected with the stage got up what he called "a Dramatic Ball." The company was disorderly and far from select. No actor or actress of any reputation was present at the ball, or took any share in the arrangements. The *Era*, the special organ of the theatrical profession, published an indignant article, commenting severely on the conduct of the prosecutor in starting such a ball for his own profit, and particularly in calling such an assembly "a Dramatic Ball. Criminal proceedings resulted in a verdict of "Not guilty." (6)

A newspaper, commenting on a flower-show, denounced one exhibitor by name as "a beggarly soul," "famous in all sorts of dirty work," and spoke of "the tricks by which he and a few like him used to secure prizes" as being now "broken in upon by some judges more honest than usual." Such remarks are clearly *not* fair criticism on the flower-show. (7)

Seeking redress for grievance.—In making an application for the purpose of obtaining redress for some injury received, care should be taken to make the application to some one having jurisdiction to entertain it, or having power to redress the grievance, or who is *reasonably believed*, by the applicant, to be under some obligation to afford a remedy; for if the applicant recklessly make statements to some one who is, as he ought to have known, altogether unconcerned with the matter, the privilege may be lost. (8)

A letter to the Secretary at War, with the intent to prevail on him to exert his authority to compel the plaintiff (an officer of the army) to pay a debt due from him to defendant, was held privileged, although the Secretary at War had no *direct* power or authority to order the plaintiff to pay his debt. "It was an application," says Best, J., "for the redress of a grievance, made to one of the

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(1) Kelly v. Tinling, L. R. 1 Q. B. 699; 35 L. J. Q. B. 231; 14 W. R. 51; 13 L. T. 255; 12 Jur. N. S. 940.

(2) Gutherole v. Miall, 15 M. & W. 319.

(3) Heriot v. Stuart, 1 Esp. 437; Stuart v. Lovell, 2 Stark. 93; Campbell v. Spottiswoode, 3 F. & F. 421; 32 L. J. Q. B. 185; 3 B. & S. 769; 9 Jur. N. S. 1069; 11 W. R. 569; 8 L. T. 201.

(4) Sir John Carr v. Hood, 1 Camp. 355*n*.

(5) Strauss v. Francis, 4 F. & F. 939, 1107; 16 L. T. 674.

(6) R. v. Ledger, *Times* for Jan. 14th, 1880. And see Dibdin v. Swan and Bostock, 1 Esp. 28.

(7) Green v. Chapman, 4 Bing, N. C. 92; 5 Scott. 340.

(8) 1 Hawk P. C., 544.

King's ministers, who, as the defendant honestly thought, had authority to afford him redress." (1)

The inhabitants of a district prepared a memorial charging plaintiff a teacher in a district school, with drunkenness and immorality, and sent it to the local superintendent of schools. It ought strictly to have been sent first, to the trustees of that particular school, who would, then, if they thought fit, in due course forward it to the local superintendent to take action upon it. *Held*, that the publication was still *primâ facie* privileged, although, by a mistake easily made, sent to the wrong quarter in the first instance. (2)

An elector of Frome petitioned the Home Secretary, stating that plaintiff, a magistrate of the borough, had made speeches inciting to a breach of the peace, and praying for an inquiry, and for plaintiff's removal from the commission of the peace. Such petition was held to be privileged, although it should more properly have been addressed to the Lord Chancellor. (3)

295. Answers to inquiries.—No one commits an offence by publishing, in answer to inquiries made of him, defamatory matter relating to some subject as to which the person by whom, or on whose behalf, the inquiry is made has, or on reasonable grounds is believed by the person publishing to have, an interest in knowing the truth, if such matter is published for the purpose, in good faith, of giving information in respect thereof to that person, and if such defamatory matter is believed to be true, and is *relevant* to the inquiries made, and also if such publishing does not in manner or extent exceed what is reasonably sufficient for the occasion.

The answer to an enquiry should not consist of irrelevant information gratuitously volunteered. For instance, if A., asks B., the name and address of C., B. is not justified in launching out into some disparagement of C's credit or conduct.

ILLUSTRATIONS.

If A., is about to have dealings with B., but first comes to C., and confidentially asks him his opinion of B., C.'s answer is privileged. (4)

If a friend tells me he wants a good lawyer to act for him and asks my opinion of Smith, I am justified in telling him all I know for or against Smith. But if a stranger asks me in the train, "Is not that gentleman a lawyer?" I should not be justified in replying, "Yes, but he ought to have been stripped of his gown long ago."

A. met B., and addressing him said: "I hear that you say the bank of Bromage and Snead at Monmouth has stopped. Is it true?" B. answered. "Yes. I was told so. It was so reported at Cricklewell; nobody would take their bills, and I came to town in consequence of it myself." *Held*, that if B. understood A. to be asking for information by which to regulate his conduct, and spoke the words by way of honest advice, they were *primâ facie* privileged. (5)

A. was asked to sign a memorial, to retain B. as trustee of a charity from

(1) Fairman v. Ives, 5 B. & Ald. 642; 1 Chit. 85; 1 D. & R. 252.
(2) McIntyre v. McBean, 13 U. C. (Q. B.) Rep. 534.
(3) Harrisson v. Bush, 5 E. & B. 344; 25 L. J. Q. B. 23, 59; 1 Jur. N. S. 846; 2 Jur. N. S. 90. Scarll v. Dixon, 4 F. & F. 250.
(4) Story v. Challands, 8 C. & P. 234.
(5) Bromage v. Prosser, 4 B. & Cr. 247; 1 C. & P. 475; 6 D. & R. 296.

which office he was about to be removed. A. refused to sign, and on being pressed for his reasons, stated them. *Held*, privileged. (1)

A. had been a Major-General commanding irregular troops during the Crimean war. Complaint having been made of the insubordination of the troops, the corps commanded by A. was placed under the superior command of General Vivian. A. then resigned, and General Vivian directed General Shirley to inquire and report on the state of the corps, and referred him for information on the matter to B. General Vivian's private secretary and civil commissioner. All communications made by B. to General Shirley touching the corps and A's management of it are privileged, if the jury find that B. honestly believed that he was acting within the scope of his duty in making them. (2)

Where a father employed the defendant to make inquiries about the position and antecedents of his daughter's husband, a report by the defendant to the father of the result of his inquiries is privileged. (3)

Nash selected A to be his attorney in an action. B, apparently a total stranger, wrote to Nash to deprecate his so employing A. This was held to be clearly *not* a confidential communication. (4)

A husband asked a medical man to see his wife and ascertain her mental condition. He reported to the husband that she was insame. *Held*, a privileged communication. (5)

I am not justified in standing at the door of a tradesman's shop and voluntarily defaming his character to his intending customers. But if an intending customer comes to me and inquires as to the respectability or credit of that tradesman, it is my duty to tell him all I know.

Horsford was about to deal with the plaintiff, when he met the defendant, who said at once, without his opinion being asked at all. "If you have anything to do with Storey, you will live to repent it; he is a most unprincipled man," &c. Lord Denman directed a verdict for the plaintiff, because the defendant began by making the statement, without waiting to be asked. (6)

296. Giving information.—No one commits an offence by publishing to another person defamatory matter for the purpose of giving information to that person with respect to some subject as to which he has, or is, on reasonable grounds, believed to have, such an interest in knowing the truth as to make the conduct of the person giving the information reasonable under the circumstances: Provided, that such defamatory matter is relevant to such subject, and that it is either true, or is made without ill-will to the person defamed, and in the belief, on reasonable grounds, that it is true.

In a marginal note, upon the subject of this article, the Royal Commissioners cite, as an authority to be referred to, in connection with this class of privileged communications, the case of Coxhead v. Richards. (7)

In that case the Judges of the English Court of Common Pleas stood equally divided, as to whether a man may inform the owner of a ship that his captain has been guilty of gross misconduct at sea. A., the defendant in the case, had

(1) Cowles v. Potts, 34 L. J. Q. B. 247; 11 Jur. N. S. 946; 13 W. R. 858.
(2) Beatson v. Skene, 5 H. & N. 838; 29 L. J. Ex. 430; 6 Jur. N. S. 780; 2 L. T. 378; Hopwood v. Thorn, 8 C. B. 293; 19 L. J. C. P. 94; 14 Jur. 87.
(3) Atwill v. Mackintosh, 6 Lathrop (120 Mass.), 177.
(4) Godson v. Home, 1 B. & B. 7; 3 Moore, 223.
(5) Weldon v. Winslow, Times for March 14th to 19th, 1884.
(6) Storey v. Challands, 8 C. & P 234.
(7) Coxhead v. Richards, 2 C. B. 569; 15 L. J., C. P., 278; 10 Jur. 984.

received, from an old and intimate friend, B., the first mate of a merchant ship a letter stating that he B., was placed in a very awkward position owing to the drunken habits, etc., of C., the captain of the ship, of which B. was the first mate, and saying,—"How shall I act? It is my duty to write to Mr Ward [the owner of the ship], but my doing so would ruin the captain and his wife and family." A.,—after much deliberation and consultation with other nautical friends.—thought it his duty to shew the letter to Ward, and did so; where upon Ward dismissed C. from his position as captain. A. knew nothing of the facts mentioned in B's letter, except from the letter itself, Tindal, C.J., told the jury that the publication of the letter by A., in shewing it to Ward was *prima facie* privileged; and they negatived malice. As the full Court was afterwards equally divided on the question of whether the shewing of the letter was privileged the verdict rendered by the jury in favor of the defendant stood.

There are many authorities shewing that if a writing, although injurious to another's character, be published, without intent to injure his character, but *bonâ fide* for the purpose of investigating a fact in which the person making it is interested, or, in which the person to whom it is made is interested, or in the performance of a duty, it is not punishable as a libel (1).

ILLUSTRATIONS.

My regular solicitor may, unasked, give me information concerning third persons of which he thinks it to my interest that I should be informed, even although not at the moment conducting legal proceedings for me. (2)

A solicitor who is conducting a case for a minor may inform his guardian of the minor's misconduct. (3)

A timekeeper employed on public works, on behalf of a public department, wrote a letter to the secretary of the department, imputing fraud to the contractor. Blackburn, J., directed the jury that if they thought the letter was written in good faith and in the discharge of the defendant's duty to his employers, it was privileged, although written to the wrong person. (4)

A relation may confidentially advise a lady not to marry a particular suitor, and assign reasons, provided he really believes in the truth of the statements he makes. (5)

A. and B. were joint owners of *The Robinson*, and engaged C. as master; In April, 1843, A. purchased B's share; in August, 1843, A. wrote a business letter to B., claiming a return of £150, and incidentally libelled C. *Held* a privileged communication, as A. and B. were still in confidential relationship. (6)

The defendant, a linendraper, dismissed his apprentice without sufficient legal excuse: he wrote a letter to her parents, informing them that the girl would be sent home, and giving his reasons for her dismissal. Cockburn, C. J., held this letter privileged, as there was clearly a confidential relationship between the girl's master and her parents. (7)

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(1) Harrison v. Bush, 5 E. & B. 344; 25 L. J., Q B., 25; Whiteley v. Adams, 15 C. B. (N. S.) 392; 33 L. J., C. P., 89; Dawkins v. Lord Paulet, L. R. 5 Q. B., 94, 102; Robshaw v. Smith, 38 L. T. 423; Todd v. Hawkins, 2 M. & Rob. 20; 8 C. & P. 88; Laughton v. Bishop of Sodor & Man 42 L. J. (P. C.) 11; L. R., P. C. 495.

(2) Davis v, Reeves, 5 Ir. C. L. R. 79.

(3) Wright v. Woodgate, 2 C. M. & R. 573; 1 Tyr. & G. 12; 1 Gale, 329 (Approved in L. R. 4 P. C. 495.)

(4) Scarll v. Dixon, 4 F. & F. 250.

(5) Todd v. Hawkins, 2 M. & Rob. 20; 8 C. & P. 88.

(6) Wilson v. Robinson, 7 Q. B. 68; 14 L. J. Q. B. 196; 9 Jur. 726.

(7) James v, Jolly, Bristol Summer Assizes, 1879.

See Fowler and wife v. Homer, 3 Camp. 294.

A., B., and C. are brother officers in the same regiment. A. meets B. and says, "I have learned that C. has been guilty of an atrocious offence: I wish to consult you whether I should divulge it—whether I should speak of it to the commanding officer." Such remark and the discussion that ensues would be privileged, if *bonâ fide*. (1)

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.

By article 3 (*p*), *ante*, it is declared, that,

"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."

The latter portion of the first paragraph of article 297 is to the same effect as section 5, (now repealed), of R.S.C., c. 163.

It is also similar to a clause contained in section 7 of Lord Campbell's Act, 6 and 7 Vict., c. 96 (Imp.), under which it has been held that the proprietors of a newspaper, who have appointed a competent editor to conduct it, are not criminally responsible for the publication of a libel inserted in the newspaper by the editor, upon proof that the publication was made without their actual authority, consent or knowledge, and that such publication did not arise from want of due care or caution on their part. (2)

Holbrook's case came up before the Court twice, each time upon a motion for a new trial, and on each occasion, (although some of the judges dissented), it

(1) Bell v. Parke, 10 Ir. C. L. R. 284.

(2) R. v. Holbrook, 3 Q. B. D. 60; 47 L. J. (Q. B.) 35; 4 Q. B. D. 42; 48 L. J. (Q. B.) 113.

was held that, upon a proper construction of the statute, general authority to an editor to conduct the business of a newspaper, in the absence of anything to give it a different character, must be taken to mean an authority to conduct it according to law, and therefore not to authorize the publication of a libel; (l) and that holding has evidently been kept in view in framing clause 2 of the above article, 297.

Article 640 *post*, provides that every proprietor, publisher, editor or other person charged with the publication in a newspaper of any defamatory libel, shall be dealt with, indicted, tried and punished in the province in which he resides, or in which such newspaper is printed.

The Imperial Statute 51-52 Vic., c. 64, (*The Law of libel Amendment Act* 1888), provides, by section 8, that, no *criminal prosecution* shall be commenced against any proprietor, publisher, editor or any persons, responsible for the publication of a newspaper, for any libel published therein, *without the order of a judge* at Chambers being *first had and obtained;* and that the application for such order shall be made on notice to the person accused, who shall have opportunity of being heard against such application.

298. Selling books containing defamatory matter. — No one commits an offence by selling any book, magazine, pamphlet or other thing whether forming part of any periodical or not, 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.

See comments under article 302, *post*.

300. Extortion by defamatory libel.—Every one is guilty of an indictable offence and liable to *two years'* imprisonment, or to a fine not exceeding six hundred dollars, or to both, who publishes or threatens to publish, or offers to abstain from publishing, or offers to prevent the publishing of a defamatory libel with intent to extort any money, or to induce any person to confer upon or procure for any person any appointment or office of profit or trust, or in consequence of any person having been refused any such money, appointment or office. R.S.C., c. 163, s. 1.

Under the repealed section 1 of the R.S.C. 163, the imprisonment for this offence was any term *less* than two years.

(l) Arch. Cr. Pl. & Ev. 21 Ed. 890, 891.

Under the Imperial statute, 6 and 7 Vic., c. 96, sec. 3, the punishment is three years' imprisonment, with or without hard labor.

301. Every one is guilty of an indictable offence and liable to two years' imprisonment or to a fine not exceeding four hundred dollars, or to both, who *publishes* any defamatory libel *knowing the same to be false.* R.S.C., 163, s. 2.

Under the repealed sec. 2 of R.S.C., c. 163, the imprisonment was for any term *less* than two years.

302. Every one is guilty of an indictable offence and liable to one year's imprisonment, or to a fine not exceeding two hundred dollars, or to both, who publishes any defamatory libel. R.S.C., c. 163, s. 3.

As to *Libels on Foreign Sovereigns*, and *Spreading False News of public interest*, see articles 125, and 126, *ante*, p. 72; and, as to *Blasphemous Libels*, see article 170, *ante*, p. 102.

See, also, pp. 68-71, *ante*, for a brief history of the law of libel in general and of seditious libels in particular.

Articles 299, *ante*, and 634, *post*, giving a defendant accused of publishing a defamatory libel, the right to plead the truth of the alleged libel, do not apply either to *seditious* or *blasphemous* libels. The truth of these cannot be pleaded as a defence.

Article 593, *post*, provides that in preliminary investigations of indictable offences, before police magistrates, the defendant may, after the examination of the witnesses for the prosecution, call and examine witnesses for the defence: but it does not seem that this gives a defendant in a libel case the right to prove at the preliminary examination the truth of the matter charged as a libel; for, although, in England, the right to call witnesses for the defence at a police court preliminary investigation existed long before the passing of the *Newspaper Libel and Registration Act* 1881, it was there held, before that Act became law, that, although, where the charge was that of maliciously *publishing* a defamatory libel *knowing it to be false*, (sec. 4 of 6 and 7 Vic., c. 96), the magistrate *had* jurisdiction to receive evidence of the truth of thelibel, so as to negative the allegation that defendant knew it to be fall he had *not* such jurisdiction, when the charge was that of simply maliciously *publishing* a defamatory libel (sec. 5 of 6 and 7 Vic., c. 96). (1)

But the *Newspaper Libel and Registration Act* 1881 made, in England, a very important change; for, by sec. 4, it enacted that, "A court of summary jurisdiction upon the hearing of a charge against a proprietor, publisher, or editor, or any person responsible for the publication of a newspaper, for a libel published therein, *may receive evidence as to the publication being for the public benefit, and as to the matters charged, in the libel being true*, and as to the report being fair and accurate, and published without malice, and as to any matter which, under this or any other act or otherwise, might be given in evidence, by way of defence, by the person charged, on his trial on indictment; and the court, if of opinion after hearing such evidence that there is a strong presumption that the jury on the trial would acquit the person charged, may dismiss the case;" and under sec. 5, of the same Act, the court, if it thinks that the libel, though proved, is of a trivial character, may, instead of sending the case before a jury, dispose of it summarily, provided the accused consents thereto, and may, in that case, adjudge him to pay a fine not exceeding £50.

An indictment for libel will not be insufficient for not setting out the words of

(1) R. v. Carden, 5 Q. B. D. 1; 49 L. J. (M. C.) 1; Arch. Cr. Pl. & Ev. 21 Ed. 976.

it; but, if the words are not set out, the court may order the prosecutor to furnish the defendant with particulars, as provided by article 615, *post*, which reads as follows:

"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.

"A count for libel may charge that the matter published was written in a sense which would make the publishing criminal, specifying that sense without any prefatory averment showing how that matter was written in that sense. And on the trial it shall be sufficient to prove that the matter published was criminal either with or without such innuendo."

A plea of justification must be in writing, and must allege not only that the matter published is true but that the publication of it was for the public benefit, and it must set forth the particular facts by reason of which it was for the public good. These formalities are required by article 834, *post*, which is as follows:

"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."

It will be seen by the fourth clause of this article that along with the plea of justification the accused may plead not guilty, and that, by clause three, if the accusation charges the defendant with publishing the libel *knowing it to be false*, he may, under the plea of not guilty, alone, adduce evidence of the truth of the matter published, so as to negative the allegation that he knew it to be false.

As the falsity of defamatory matter is presumed, the prosecution need not produce evidence of its falsity. The *onus* is upon the defendant to prove that it is true that it is matter of public interest, and that the publication of it was for the public benefit; and the *whole* of the libel must be proved true. The justification must be as broad as the charge. If a material part be not proved to be true, the Crown will be entitled to a verdict (1)

If the gist of the libel consists of one specific charge which is proved to be true, and of public interest it is not necessary, in that case, that the defendant should justify every expression used by him in commenting on the prosecutor's conduct in connection with such specific charge. If the substantial imputation be proved true, a slight error in some detail will not prevent the defendant succeeding, provided such error in no way alters the complexion of the affair and would not have, on the reader, any different effect from that which the literal truth would produce. (2) If epithets or terms of general abuse be used, which do not add to the sting of the charge, they need not be justified. (3) But if these additional terms of abuse insinuate some further charge, in addition to the main imputation, or imply some circumstance substantially aggravating the main imputation, they must be justified as well as the rest. (4) In such a case, it will be a question for the jury whether the substance of the libellous statement has been proved true to their satisfaction. (5) As was said by Lord Denman, "It would be extravagant to say that in cases of libel *every* comment upon the facts requires a justification. A comment may introduce independent facts, a justification of which is necessary, or it may be the mere shadow of the previous imputation." (6)

In order to justify a libel it will not be sufficient to say that the defendant merely repeated what was said by another person. For instance, if the libel, complained of, be "A. B. said that C. had been guilty of fraud," etc., it would be no justification, for publishing these words, to plead that A. B. did in fact make that statement; for each repetition is a fresh defamation and the defendant, by repeating A. B's words, has made them his own, and is legally as liable as if he had invented the story himself. The only plea of justification which will be an answer, in such a case, must not merely allege that A. B. did in fact say so, but it must go on to aver, with all necessary particularity, that every statement which A. B. is reported by the defendant to have made is true in substance and in fact. (7) This rule, requiring justification of every substantial part of the alleged libel, was considered to press too severely on newspaper proprietors and editors, and, on that account it was relaxed, in their favor, as we have already seen, (8) by special legislation, under which newspaper reports of public meetings are privileged when they are fair and accurate reports of matters of public interest, the publication of which is for the public benefit.

ILLUSTRATIONS.

Libel complained of:—that A., a proctor, was three times suspended from practice for extortion. Proof that he had *once* been so suspended held insufficient. (9)

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(1) R. v. Newman, 1 E. & B., 268, 558; 22 L. J. Q. B., 156.
(2) Alexander v, N. E. Ry, Co. 34 L. J. Q. B. 152; Blake v. Stevens, 4 F. & F. 239; 11 L. T. 544
(3) Edwards v. Bell, 1 Bing. 403; Morrisson v. Harmer, 3 Bing. N. C. 767.
(4) Helsham v. Blackwood, 11 C. B. 129; 20 L. J., C. P. 192
(5) Warman v. Hine, 1 Jur. 820; Weaver v. Lloyd, 2 B. & C. 678; 4 D. & R. 230.
(6) Cooper v. Lawson, 3 Ad. & E. 753.
(7) McPherson v. Daniels, 10 B. & C. 263; 5 M. & R. 251; Odgers Lib. & Sl. 174.
(8) See articles 291, 292, and 293, and comments thereon, pp. 228-234, *ante*.
(9) Clarkson v. Lawson, 6 Bing. 266; 3 M. & P. 605; 6 Bing. 587; 4 M. & P. 356; Goodburne v. Bowman and others, 9 Bing. 532; Clark v. Taylor, 2 Bing. N. C. 654; 3 Scott, 95; 2 Hodges, 65.

Libel complained of:—"A. B. and C. are a gang who live by card-sharping." Plea: not guilty, and a justification giving several specific instances in which persons named had been cheated by the trio at cards. *Held*, by Cockburn, C. J., when two specific instances were proved, that the plea was proved in substance, and not necessary to prove other instances alleged. (1)

Libel complained of was headed—"How Lawyer B treats his clients," followed by a report of a case in which *one* client of Lawyer B. had been badly treated. That particular case was proved to be correctly reported *Held*, insufficient to justify the heading, which implied that Lawyer B. *generally* treated his clients badly. (2)

Libel complained of exposed the "homicidal tricks of those impudent and ignorant scamps who had the audacity to pretend to cure all diseases with one kind of pill;" it also asserted that "several of the rotgut rascals had been convicted of manslaughter, fined, and imprisoned for killing people with enormous doses of their universal vegetable boluses," and characterized the plaintiffs' system as "one of wholesale poisoning." It was proved at the trial that plaintiffs' pills, when taken in large doses, as recommended by plaintiffs, were highly dangerous, deadly and poisonous, that two persons had died in consequence of taking large quantities of them; and that the people who had administered these pills were tried, convicted, and imprisoned for the manslaughter of these two persons Held a sufficient justification, although the expressions "scamps," "rascals," and "wholesale poisoning" were not fully substantiated: the main charge and gist of the libel being amply sustained. (3)

It is libellous to publish a highly-coloured account of judicial proceedings mixed with the reporter's observations and conclusions upon what passed in Court, containing an insinuation that plaintiff had committed perjury and it is no justification to pick out such parts of the libel as contain an account of the trial, and to plead that such parts are true and accurate, leaving the extraneous matter unjustified. (4)

A rumour was current on the Stock Exchange that the chairman of the S. E. R. Co. had failed; and the shares of the company consequently fell; thereupon the defendant said. "You have heard what has caused the fall—I mean, the rumour about the S. Eastern chairman having failed?" *Held*, that a plea that there was in fact such a rumour was no answer to the action. (5)

For Forms of plea of justification, replication, etc., see pp. 261, and 262, *post*.

Trial and verdict.—Article 669, *post*, provides that, in Libel cases, the right of the Crown to cause any juror to stand aside, until the panel has been gone through, shall not be exercised by a private prosecutor; and article 719, *post*, has the following provision with regard to the 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

(1) Reg. (pros. Lambri) v. Labouchère, 14 Cox, C. C. 419. And see Willmett v. Harmer and another, 8. C. & P. 695.

(2) Bishop v. Latimer, 4 L. T. 775; Mountney v. Watton, 2 B & Ad. 673; Chalmers v. Shackell, 6 C. & P. 475; Clement v. Lewis and others. 3 Brod. & Bing. 297; 7 Moore, 200; 3 B. & Ald 702.

(3) Morrison v. Harmer, 3 Bing. N. C. 767; 4 Scott, 533; 3 Hodges, 108; Edsall v. Russell, 4 M. & Gr. 1090; 5 Scott, N. R. 801; 2 Dowl. N. S. 641; 12 L. J. C. P 4; 6 Jur. 996.

(4) Stiles v. Nokes, 7 East, 493.

(5) Watkin v. Hall, L. R. 3 Q. B. 396; 37 L. J. Q. B. 125; 16 W. R. 857; 18 L. T. 561; Richards v. Richards, 2 Moo. & Rob. 557.

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."

Costs. —Under Article 832, post, the Court, upon the conviction of any person for libel,—(in common with any other indictable offence),—may, in addition to the sentence, condemn the defendant to pay the whole or any part of the costs or expenses incurred in and about the prosecution.

With regard to the costs of the defence when the prosecution is unsuccessful, Article 833 provides as follows:

"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."

Criminal informations.—We have already seen, that *finding the indictment* includes *exhibiting an information*, and that a *Criminal Information* in this sense means an accusation of crime made and tried, without the intervention of a grand jury, in cases of offences which tend to disturb the public peace, or to interfere with good government,—such as, seditious or blasphemous libels, or other libels in which the general public are interested, official corruption, etc. (1)

Criminal informations are of two kinds; one,—called an information *ex-officio*,—being laid by the Attorney-General or Solicitor-General, and the other being made by the Master of the Crown office, (2) at the instance of some private individual. (3)

Archbold describes an information, *ex officio* as "a formal written suggestion of an offence committed, filed by the Queen's Attorney-General, (or, in the vacancy of that office, by the Solicitor-General), (4) in the Queens Bench Division of the High Court of Justice, without the intervention of a grand jury."

Odgers says, that informations *ex officio* are, as a rule, confined to libels of so dangerous a nature as to call for immediate suppression by the officers of the State; especially blasphemous, obscene, or seditious libels, or such as are likely to cause immediate outrage and public riot and disturbance; and which, therefore, render it expedient for the Attorney-General himself to take the initiative.

Archbold cites a case, in which informations *ex officio* were filed in 1858 against the directors of a banking company for a conspiracy to defraud the shareholders by false reports of the pecuniary condition of the bank. (5)

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(1) See p. 3, *ante*.
(2) NOTE: In Canada, the proper officer would be the Clerk of the Crown
(3) Arch. Cr. Pl. & Ev. 21 Ed 124-126; and Odgers Lib. & Sl., 427.
(4) R. v. Wilkes, 4 Burr. 2527; 4 Bro. P. C. 360.
(5) R. v. Brown & others, Arch. Cr. Pl. & Ev. 21 Ed. 122.

An information *ex officio,* (1) is filed in the Crown office, *without any leave* previously obtained of the Court for that purpose. The defendant, after appearance upon application to the Court, is entitled to a copy of the information, free of expense. If the information be not brought to trial within twelve calendar months next after a plea of not guilty has been pleaded, the defendant may after twenty days' notice to the Attorney-general or Solicitor-general, apply to the court in which the prosecution is depending, and obtain its authorization to bring on the trial, and having obtained such authorization he may bring it on accordingly, unless a *nolle prosequi* be entered.

Archbold describes an information by the Master of the Crown Office as "a formal written suggestion of an offence committed, filed in the Queens Bench Division of the High Court of Justice, at the instance of an individual, *with the leave of the Court,* by the Master of the Crown Office, without the intervention of a grand jury."

Criminal informations therefore which are not *ex officio,* and, not filed, as such, by the Attorney General, cannot be filed without an express order of the Court, that is, an order (in England), of the Queen's Bench Division, of the High Court of Justice, or, (in Canada), of a Superior Court of Criminal jurisdiction, granted in open Court.

The practice is for Counsel to move the Court upon proper affidavits for an order *nisi* calling upon the defendant to show cause why an information should not be granted. The prosecutor must consent to waive his civil remedy by action, if need be, and be prepared to go through with the criminal proceedings to conviction. The affidavits should be carefully drawn up; for no second application can be made on amended or additional affidavits. (2) They should contain legal evidence to convince the court that it would be sufficient to justify a grand jury in returning a true bill for the offence complained of. Where, for instance, the affidavits merely showed that the annexed copy of the *Newcastle Daily Chronicle,* the newspaper containing the libel, had been purchased from a salesman, in the office of that paper, and that in a footnote at the end of that copy the defendant was stated to be the printer and publisher of the newspaper, and the relator believed him so to be; it was held that this was no legal evidence of publication; and the rule was discharged. (3) If the defendant keeps an office or shop at which copies of the paper can be purchased, then an affidavit by a person who purchased a copy of the libel at such office or shop will be the best evidence of a publication by the defendant, and also that most easily obtainable. That the purchase was made expressly for the purpose of enabling such affidavit to be sworn is no objection. (4)

The prosecutor must also swear to his innocence in all particulars of any specific charge made against him in the libel. (5) Unless he does this, the Court will not interpose, but will leave the prosecutor to proceed by way of indictment in the ordinary course. (6) In cases where the libel contains no specific charge there would of course be no necessity for such an affidavit. (7)

If a general charge be made and a specific instance alleged, the affidavit must expressly negative not only the general charge, but also the specific instance. (8)

The affidavits should be sworn with *no* heading or title; and should not contain irrelevant or improper matter. If the prosecutor abuses the alleged

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(1) For Form see p. 262, *post.*
(2) R. v. Franceys, 2 A. & E 49.
(3) R. v. Stranger, L. R. 6 Q. B. 352; 40 L. J. Q. B. 96.
(4) Duke of Brunswick v. Harmer, 14 Q. B. 189; 19 L. J. Q. B. 20; 14 Jur. 110; 3 C. & K. 40.
(5) R. v. Webster, 3 T. R. 388
(6) R. v. Bickerton, Str. 498; R. v. Draper, 3 Smith 390.
(7) R. v. Williams, 5 B. & Ald 595.
(8) R. v. Aunger, 12 Cox, C. C. 407.

libeller or shows an *animus* against him, the court will very probably reject the application. (1)

The order *nisi*, if granted, should be drawn up "*Upon reading*" the alleged libel and the affidavits and all other documents to which it is desired to refer on the argument.

When the rule *nisi* is drawn up it should be served, *personally*, upon the defendant.

In shewing cause against the rule the defendant generally files affidavits in reply to those filed in support of the information; and it is open to him to maintain that the libel is true.

If the order be discharged on the merits the court generally gives the defendant his costs; and no second application can be made, even on additional affidavits; (2) except under very peculiar circumstances, as where the only person who had made an affidavit on behalf of the defendant, against the rule, has been since convicted of perjury in respect of such affidavit. (3)

Although the prosecutor cannot make a second application for a criminal information, after the first application has been dismissed he has still the right to proceed, in the ordinary way, before the police magistrates, in order to have the offender committed for trial by indictment. (4)

If the rule is made absolute, the prosecutor is then required to enter into recognizances to effectually prosecute the information. The information must then be drawn up setting out the offence with the same precision as in an indictment; and, as soon as it is filed, a copy of it must be served on the defendant; who must appear within a time to be fixed; or, in default of his appearance, he may be apprehended under a Bench Warrant. The case is then brought to trial in due course, in the same way as any ordinary trial upon an indictment.

With regard to a criminal information, of the class which are not *ex officio*, the offence in relation to which an application is made for one must be such an offence as calls for prompt and immediate interference before the court will grant it. There must be some evidence that the ordinary remedies by action or indictment are insufficient in the particular case; and in cases, for instance, where, upon the filing of a criminal information for criminal libel, it appears, that, the prosecutor relator has himself libelled the party complained of, (5) or that he has, in any way, invited or provoked the publication of which he complains; (6) or that he has had an opportunity, (of which he has not availed himself), of expressing his disapproval of its terms, (7) or that he has demanded and received explanations from the defendant, (8) or that he has been, himself, guilty of any misconduct in relation to the matter, a rule giving leave to prosecute the information will be refused, unless the public have, in the particular instance in hand, a direct and independent interest in the prompt suppression of the libels. (9)

The Court, in granting leave to prosecute a criminal information, formerly took into account the rank and dignity of the person libelled; and informations

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(1) R. v. Burn, 7 A. & E. 190.
(2) R. v. Smithson, 4 B. & Ad. 862.
(3) R. v. Eve & Parlby, 5 A. & E. 780.
(4) R. v. Cockshaw, 2 N. & M. 378.
(5) R. v. Nottingham Journal, 9 Dowl. 1042.
(6) R. v. Larrieu, 7 A. & E. 277; R. v. Hall, 1 Cox, C. C. 344; *ex parte* Rowe, 20 L. T. (Old S.) 115; 17 J. P. 25.
(7) R. v. Lawson, 1 R. B. 486.
(8) *Ex parte* Doveton, 7 Cox, C. C. 16; 26 L. T. (Old. S.) 73; *ex parte* Haviland, 41 J. P. 789.
(9) R. v. Casey, 13 Cox, C. C. 310.

have been granted for imputing that the children of a marquis were bastards; (1) that a peer had married an actress; (2) that a naval captain was a coward, a bishop a bankrupt, a peer a perjurer, etc, etc. But, now, it is settled that rank and station confer no superior claim to the summary interference of the Court. A peer is no more entitled to a criminal information when his *private* character is attacked than the humblest servant of the Queen (3) Odgers gives an instance in which a criminal information was obtained by a grocer, (4) and another in which it was granted to a housekeeper. (5)

The Courts, however, have, of late years, been very chary of granting criminal informations; and as a rule, in England, they will only be granted, now, where the applicant holds some public office; or where the libel tends to obstruct the course of justice, or to prejudice the fair trial of any accused person. (6)

If there be general reflections on a body or class, no particular individual being specially attacked, and if the reflections are such as tend to cause outrage or lead to violence, an information will be granted; as, where the general body of clergymen in a particular diocese were libelled; (7) or, where the libel was on the Jews, and some Jews in consequence were ill-used by the mob. (8) In Osborn's case, the publication complained of, was a sensational account of a cruel murder by certain Jews said to have lately arrived from Portugal, and then living near Broad street, London. They were said to have burnt a woman and a new-born bady, because its father was a Christian. Certain Jews who had arrived from Portugal, and who then lived in Broad street, were attacked by the mob, barbarously treated, and their lives endangered. A criminal information was granted, although it was objected that it did not appear precisely who were the persons accused of the murder.

The application for a criminal information must be made promptly; or the delay will be ground for refusing it.

ILLUSTRATIONS.

A county court judge illegally refused to hear a barrister who appeared before him. The barrister memorialised the Lord Chancellor. Obtaining no redress, he applied to the Court of Queen's Bench for a criminal information. This would have been granted him, had he not previously applied to the Lord Chancellor. (9)

An Irish Q. C., in addressing the jury as counsel in a cause, made a fierce attack on the plaintiff, an attorney. This attack was pertinent to the issue and not malicious; but the observations were unusually harsh and irritating. The plaintiff won the action, and then wrote to the Q. C., calling on him to retract the charges. The Q. C. refused; thereupon plaintiff wrote the Q. C. a letter, couched in the most offensive language, and obviously intended to provoke a duel. The Court made the rule for a criminal information absolute; but ordered that the information should not issue without further order. (10)

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(1) R. v. Gregory, 8 A. & E. 907; 1 P. & D. 110.

(2) R. v. Kinnersley, 1 Wm Bl. 294.

(3) Reg. (pros Vallombrosa) v. Labouchère, 12 Q. B. D 320; 53 L. J. Q. B 362; 32 W. R. 861; 50 L. T. 177; 15 Cox, C. C. 415; 48 J. P. 165.

(4) R. v. Benfield, 2 Burr. 980.

(5) R. v. Tanfield, 42 J. P. 423.

(6) R. v. Watson and others, 2 T. R. 199; R. v. Joliffe, 4 T. R. 285; R. v. White, 1 Camp. 359; *Ex parte* Duke of Marlborough, 5 Q. B. 955; 13 L. J. (M. C.) 105; 1 D. & M 720; R. v Gray, 10 Cox, C. C 184.

(7) R. v. Williams, 5 B. & Ald. 595.

(8) *Anon.* 2 Barn. 138; R. v Osborn, 2 Barn. 166; Kel. 230.

(9) R. v. Marshall, 4 E. & B 475.

(10) Reg. (pros. Armstrong,) Q. C. v. Kiernan, 7 Cox, C. C. 6; 5 Ir. C. L. A. 171. Reg. (pros. Butt,) Q. C. v. Jackson, 10 Ir. L. R. 120.

Lord George Gordon was tried in 1787 and convicted upon an information charging him with libelling Marie Antoinette, Queen of France, and "her tool" the French Ambassador in London. He was fined £500 and sentenced to two years' imprisonment, and at the expiration of that time to find sureties for his good behaviour. This he could not do, so he remained in prison till he died on November 1st, 1793. (1)

The *Courier* published the following passage :—"The Emperor of Russia is rendering himself obnoxious to his subjects by various acts of tyranny, and ridiculous in the eyes of Europe by his inconsistency. He has now passed an edict prohibiting the exportation of timber, deals, and other naval stores. In consequence of this ill-timed law, upwards of 100 sail of vessels are likely to return to this country without freights." This was deemed a libel upon the Emperor Paul I. An information was granted, and the proprietor of the *Courier* was find £100, sentenced to six months' imprisonment, and to find sureties for good behaviour for five years from the expiration of that term. The printer and publisher were also sentenced to one month's imprisonment. (Lord Kenyon, C. J.) (2)

A Queen's counsel obtained a criminal information for libellous verses and for a caricature imputing to him professional misconduct in the conduct of a case. (3)

The solicitors to a railway company were refused a rule for a criminal information for a libel on them by the directors, imputing extortion and fraud. They were left to bring an action. (4)

A French refugee in England wrote a stilted poem about the apotheosis of Napoleon Buonaparte, then first consul of the French Republic, suggesting that it would be an heroic deed to assassinate him. He was held amenable to the English criminal law, although the libel was purely political, affected no one in in the British Isles, and attacked the man who was England's greatest enemy at the time. The jury found him guilty ; but war broke out again between England and France soon afterwards, and no sentence was ever passed. (5)

For Forms of Criminal Informations and pleadings, see p. 262.

(1) R. v. Lord George Gordon, 22 How St. Tr. 177.
(2) R. v. Vint. (1799), 27 How St. Tr. 627.
(3) Sir W. Garrow's Case, 3 Chit. Cr. Law, 884.
(4) Ex parte Baxter, 28 J. P. 326.
(5) R. v. Jean Peltier, 28 How St. Tr. 617.

FORMS OF INDICTMENT UNDER TITLE V.

HEADING OF INDICTMENT. (1)

In the (*name of the Court in which the indictment is found.*)

The Jurors for our Lady the Queen present that (*Where there are more counts than one, add at the beginning of each count*) :

" The said Jurors further present that

STATEMENTS OF OFFENCES.

OMISSION OF GAOLER TO SUPPLY PRISONER WITH NECESSARIES OF LIFE.

At on and on and at divers other days and times, before and since that date A., being then and there the keeper of the common gaol for the district of , situated and being at aforesaid, had charge. as such keeper, of B., one of the prisoners then and there detained in the said gaol, and unable, by reason of such detention, to withdraw himself from such charge and unable to supply himself with the necessaries of life ; and that the said A., being then and there under a legal duty and being bound by law to supply the said B., with the necessaries of life, did, in disregard of his duty in that behalf then and there unlawfully refuse, neglect and omit, without lawful excuse to provide the said B., with the necessaries of life by means whereof the life of the said B., has been and is endangered ; (or, *the health of the said B., has been and is likely to be permanently injured.*)

OMISSION OF FATHER TO PROVIDE NECESSARIES FOR CHILD UNDER SIXTEEN.

At on , and on and at divers other days and times, before and since that date, A., being then and there the father of B., a child under sixteen years of age, who was then and there a member of the said A.'s household, and the said A., being, as such father, under a legal duty and bound by law to provide sufficient food, clothing and lodging and all other necessaries for the said B., his said child, did, in disregard of his duty in that behalf, then and there, unlawfully, refuse, neglect and omit, without lawful

(1) See as to requisites of indictments, articles 608 to 619 inclusive.

excuse, to provide necessaries for the said B., his said child by means whereof the life of the said B., has been and is endangered ; (*or* " the health of the said B., is now and is likely to be permanently injured.")

OMISSION OF HUSBAND TO PROVIDE NECESSARIES FOR WIFE.

(*Commence as above*) A., the husband of B., being then and there, as such husband, under a legal duty and bound by law to provide sufficient food, clothing and lodging and all other necessaries for A., his said wife, did, in disregard of his duty in that behalf, then and there, unlawfully, refuse, neglect and omit, without lawful excuse, to provide necessaries for her the said B., by means whereof the life of the said B., has been and is endangered, (*or*, " the health of the said B., is now and is likely to be permanently injured.")

OMISSION OF MASTER TO PROVIDE, NECESSARIES FOR SERVANT OR APPRENTICE.

(*Commence as above*) A., being then and there the master of B., a servant, (*or* " an apprentice "), under the age of sixteen years, and being then and there under contract and legally bound to provide necessary food, clothing and lodging for the said B., as his said servant, (*or* " apprentice "), did in disregard of such contract and of the legal duty imposed upon him by law, in that behalf, then and there unlawfully refuse, neglect and omit, without lawful excuse, to provide necessary food, clothing and lodging for the said B., by means whereof the life of the said B. has been and is endangered ; (*or* " the health of the said B. has been and is likely to be permanently injured.")

ABANDONING CHILD UNDER TWO YEARS OF AGE.

On at A unlawfully did abandon and expose A., a child then under the age of two years, whereby the life of the said A. was and is endangered ; (*or* " the health of the said A. has been and is permanently injured.")

CAUSING BODILY HARM TO SERVANT OR APPRENTICE.

On at A., being then and there the master of B., a servant, (*or* " an apprentice "), and being legally liable to provide for the said B., as his said servant (*or* " apprentice "), then and there unlawfully did do and cause to be done bodily harm to the said B., whereby the life of the said B. was and is endangered ; (*or* " the health of the said B. has been and is likely to be permanently injured.")

MURDER.

A. murdered B. at on

OR.

At on A. did commit murder. (1)

ATTEMPT TO MURDER BY POISONING.

At on A. unlawfully did administer (*or* " cause to be administered ") to B. certain poison (*or* " a certain destructive thing ") to wit, with intent, thereby, then and there, to murder the said B. (*or* " with intent, thereby, then and there, to commit murder.")

OR.

At on A. unlawfully did attempt to administer (*or* " to cause to be administered ") to B. certain poison

(1) See articles 611 and 613, *post*.

(*or* "a certain destructive thing") to wit, with intent, thereby, then and there, to murder the said B. (*or* "with intent, thereby, then and there, to commit murder.")

ATTEMPT TO MURDER BY WOUNDING, ETC.

At on , A. unlawfully did wound (*or* "cause grievous bodily harm") to B. with intent, thereby, then and there, to murder the said B. (*or* "with intent, thereby, then and there, to commit murder").

ATTEMPT TO MURDER, BY SHOOTING. (1)

At on , A., unlawfully did, with a certain loaded gun (*or* "pistol," *or* "revolver") shoot (*or* attempt to discharge a loaded arm") at B., with intent, thereby, then and there, to murder the said B. (*or* "with intent, thereby, then and there, to commit murder").

ATTEMPT TO MURDER, BY DROWNING, ETC.

At on , A., unlawfully did attempt to drown (*or* "suffocate," or "strangle") B., with intent, thereby, then and there, to murder the said B., (*or* "with intent, thereby, then and there, to commit murder").

ATTEMPT TO MURDER, BY EXPLOSION.

At on , A., unlawfully, did by the explosion of a certain explosive substance, (2) to wit, [*Describe the explosive*], destroy (*or* "damage") a certain building situate and being in street, in aforesaid, with intent, thereby, then and there, to murder B., (*or* "with intent, thereby, then and there, to commit murder").

ATTEMPT TO MURDER BY BURNING A SHIP.

At on , A., unlawfully, did set fire to a certain ship to wit, with intent, thereby, then and there, to murder B. (*or* "with intent, thereby, then and there, to commit murder").

ATTEMPT TO MURDER, BY CASTING AWAY OR DESTROYING A SHIP.

At on , A., unlawfully, did cast away (*or* "destroy") a certain ship, to wit, , with intent, thereby, then and there, to murder B., (*or* "with intent, thereby, then and there, to commit murder").

ATTEMPT TO MURDER, BY ANY MEANS.

At on , A., by then and there, cutting the rope of a certain hoist (*or* "breaking the chain of a certain elevator") in a certain building situate and being in street in aforesaid, (or, *otherwise describe the actual deed*) did unlawfully attempt to murder B. (*or* "to commit murder").

THREATENING, BY LETTER, TO KILL OR MURDER.

At on A., unlawfully did send (*or* "deliver"), to (*or* "cause to be received by") B., a certain letter (*or*

(1) See article 3 (*o*), *ante*, p. 4, for definition of "loaded arms."

"writing") threatening to kill (*or* "murder") the said B., he the said A., then knowing the contents of the said letter (*or* "writing"). (1)

OR,

At on , A, unlawfully did utter a certain writing, (2) (*or* "letter"), threatening to kill (*or* "murder") B., he the said A., then knowing the contents of the said writing (*or* "letter").

CONSPIRACY TO MURDER.

At on , A., B., and C. did unlawfully conspire and agree together to murder D., (*or* "to cause D., to be murdered.")

COUNSELLING MURDER.

At on , A., did unlawfully counsel (*or* "attempt to procure") B., to murder C.

MANSLAUGHTER.

A unlawfully did kill and slay B., at on

OR,

At on A., did commit manslaughter.

AIDING AND ABETTING SUICIDE.

At on , and on divers other days before that date, A., unlawfully did counsel and procure B., to commit suicide, in consequence of which counselling and procurement by the said A., the said B., then and there, actually did commit suicide.

ATTEMPT TO COMMIT SUICIDE.

A.. at on unlawfully did attempt to commit suicide by then and there endeavouring to kill himself.

NEGLECT TO OBTAIN ASSISTANCE IN CHILD-BIRTH.

At on , A., being then and there, with child and about to be delivered of such child, unlawfully, with intent that her said child should not live, did, then and there neglect to provide reasonable assistance in her delivery, whereby and in consequence of which neglect her said child was and is permanently injured, (*or* "died during or shortly after birth.")

OR,

(*Commence as above*) with intent to conceal the fact of her having had a child, did, then and there neglect to provide reasonable assistance in her delivery, whereby, and in consequence of which neglect, her said child was and is permanently injured, (*or* "died during, or shortly after birth.")

CONCEALMENT OF BIRTH.

On at , A., was delivered of a child, and that subsequently on at aforesaid, the

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(1) The letter or writing may or may not be set out. If it is not set out it will not invalidate the indictment. *See* article 613, *post.*

(2) See article 3 (*ee*), *ante* p. 7 for definition of "writing."

said child being dead, the said A., (*or* "B") unlawfully did dispose of the dead body of the said child, by secretly burying it, (*or state the actual means used*), with intent to conceal the fact that the said A., had been delivered of such child.

WOUNDING WITH INTENT TO MAIM, ETC.

On at A., with intent to maim (*or* "disfigure," *or* "disable" *or* "do grievous bodily harm to") B., unlawfully did wound (*or* "cause grievous bodily harm to") the said B.

OR.

On at , A. with intent to resist the lawful apprehension (*or* "detainer") of him the said A. (*or* "of B.") unlawfully did wound (*or* "cause grievous bodily harm to") C.

OR.

On at A., with intent to maim (*or* "disfigure," *or* "disable," *or* "do grievous bodily harm to") B., unlawfully did with a certain loaded gun (*or* "pistol," *or* revolver") shoot (*or* "attempt to discharge a loaded arm") at the said B.

OR.

On at , A. with intent to resist the lawful apprehension (*or* "detainer" of him the said A. (*or* "of B.") unlawfully did, with a certain loaded gun (*or* "pistol" *or* "revolver") shoot (*or* "attempt to discharge a loaded arm") at C.

WOUNDING, WITHOUT INTENT.

On at , A. unlawfully did wound (*or* inflict grievous bodily harm upon") B.

SHOOTING AT HER MAJESTY'S VESSELS.

At on , A. unlawfully did, with a certain loaded gun (*or* "pistol") shoot at a vessel belonging to Her Majesty (*or* "in the service of Canada.")

WOUNDING A PUBLIC OFFICER. (1)

At on , A unlawfully did maim (*or* "wound") B., a public officer engaged in the execution of his duty, (*or* "a person acting in aid of C., a public officer engaged in the execution of his duty.")

CHOKING OR DISABLING WITH INTENT TO COMMIT AN INDICTABLE OFFENCE.

At on , A., with intent thereby to enable him the said A. (*or* "one B.") to rob C., unlawfully did attempt to choke (*or* "suffocate," *or* "strangle") the said C.

OR.

At on , A., with intent thereby to enable him the said A., (*or* "one B.") to rob (*or* "to commit a rape upon") C., unlawfully did attempt to render the said C. insensible, (*or* "unconscious,"

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(1) 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. See article 3 (*w.*) *ante.*

or " incapable of resistance "), by gagging (*or* " garotting," *or* " sandbagging " *or* [*mention the actual means used*], (the said C., in a manner calculated to choke, (*or* " suffocate," *or* " strangle ") the said C.

DRUGGING WITH INTENT TO COMMIT AN INDICTABLE OFFENCE.

At on , A., with intent, thereby, to enable him, the said A., (*or* " one B.") to rob (*or* " to commit a rape upon ") C., unlawfully did apply and administer (*or* " attempt to apply and administer ") to (*or* " cause to be taken by ") the said C. ,certain chloroform (*or* " landanum," *or mention the stupefying or overpowering drug, matter or thing used*).

ADMINISTERING POISON AND THEREBY ENDANGERING LIFE.

On at , A. unlawfully did administer (*or* " cause to be administered ") to (*or* " cause to be taken by ") B., certain poison (*or* " a certain destructive and noxious thing "), to wit, , and did thereby endanger the life of (*or* " inflict grievous bodily harm upon ") the said B.

ADMINISTERING POISON WITH INTENT TO INJURE.

On at , A., with intent, thereby, to injure, (*or* " aggrieve," *or* " annoy ") B. unlawfully did administer (*or* " cause to be administered ") to (*or* " cause to be taken by ") the said B., certain poison (*or* " a certain destructive and noxious thing "), to wit, [*Describe the drug or other noxious thing, and mention the quantity used.*]

CAUSING BODILY INJURY, BY EXPLOSION.

On at , A., by the explosion of a certain explosive substance to wit, , unlawfully did burn, (*or* " maim," *or* " disfigure ", *or* " disable ", *or* " do grievous bodily harm ") to B.

CAUSING EXPLOSION, WITH INTENT TO INJURE.

At on , A., with intent thereby to burn (*or* " maim," *or* " disfigure," *or* " disable," *or* " do grievous bodily harm to ") B. (*or* " any person ") unlawfully did cause a certain explosive substance to wit, , to explode

SENDING AN EXPLOSIVE SUBSTANCE WITH INTENT TO INJURE.

At on , A., with intent thereby to burn (*or* " maim," *or* " disfigure," *or* " disable," *or* " do grievous bodily harm to ") B., unlawfully did send (*or* " deliver ") to (*or* " cause to be taken into the possession of " *or* " to be received by ") the said B., a certain explosive substance to wit,

PLACING DESTRUCTIVE FLUIDS, ETC., WITH INTENT TO INJURE.

At on , A., with intent thereby to burn (*or* maim," *or* " disfigure," *or* " disable," *or* " do grievous bodily harm to ") B., unlawfully did put and lay, in a certain place, to wit, [*describe the place*] a certain fluid (*or* " destructive " *or* " explosive substance " to wit, [*describe the fluid or substance.*]

CASTING DESTRUCTIVE FLUIDS, ETC., WITH INTENT TO INJURE.

At on , A , with intent thereby to burn (*or* " maim," *or* " disfigure," *or* " disable," *or* " do grievous bodily

harm to") B., unlawfully did cast and throw at and upon the said B, a certain corrosive fluid (*or* "destructive" *or* "explosive substance") to wit, [*describe the fluid or substance used.*]

SETTING SPRING-GUNS, ETC.

On at , A., unlawfully did set and place (*or* "cause to be set and placed") in a certain (*describe where set*) a certain spring-gun, (*or* "man-trap"), calculated to destroy human life (*or* "inflict grievous bodily harm"), with intent that the same (*or* "whereby the same") might destroy (*or* "inflict grievous bodily harm upon") any trespasser, or other person coming in contact therewith.

INTENTIONALLY ENDANGERING RAILWAY PASSENGERS.

On at , A., upon and across a certain railway there called , a certain piece of wood (*or* "stone," *etc.*) did unlawfully put (*or* "throw"), with intent thereby to injure or endanger the safety of persons travelling, (*or* "being") upon the said railway.

OR.

On at , A., from a certain railway, there called , a certain rail (*or* "railway switch" *etc.*) there being upon and belonging to such railway, did unlawfully take up, (*or* "remove," *or* "displace"), with intent thereby to injure or endanger the safety of persons travelling, (*or* "being") upon the said railway.

OR.

On at , A., a certain point (*or other machinery*) then being upon and belonging to a certain railway called , did unlawfully turn (*or* "move," *or* "divert"), with intent thereby to injure or endanger the safety of persons travelling (*or* "being") upon the said railway.

OR.

On at , A., unlawfully did make (*or* "show," *or* "hide," *or* "remove") a certain signal (*or* "light") upon (*or* "near to") a certain railway called
with intent, thereby to injure or endanger the safety of persons travelling (*or* "being") upon the said railway.

OR.

On at , A., a certain piece of wood (*or* "stone" *etc.*), unlawfully did throw (*or* "cause to fall" *or* "strike") at, (*or* "against," *or* "into" *or* "upon") a certain engine, (*or* "tender," *or* "carriage," *or* "truck"), then being used and in motion upon a certain railway there called , with intent, thereby, to injure or endanger the safety of B, then and there being upon the said engine (*or* "tender" *or* "carriage," *or* "truck" *or* "another engine *etc.*, of the train of which the said first mentioned engine *etc.* then formed part.")

NEGLIGENTLY ENDANGERING THE SAFETY OF RAILWAY PASSENGERS.

On at , A., by wilfully omitting and neglecting to do his duty, that is to say, by wilfully omitting and neglecting to (*set out the particular act omitted to be done*) which it was then the duty of him the said A. to do, unlawfully did endanger (*or* "cause to be endangered") the safety of persons then conveyed (*or* "being") in and upon a certain railway there called

DOING INJURY BY FURIOUS DRIVING.

On at , A., being in charge of a certain vehicle, to wit, a four-wheeled cab, did then and there by his wanton and furious driving, of (*or* "racing") of and with the said vehicle unlawfully do (*or* "cause to be done") bodily harm to B.

PREVENTING THE SAVING OF A SHIPWRECKED PERSON. (1)

On at , A., unlawfully did prevent and impede (*or* "endeavor to prevent and impede") B., a shipwrecked person, in his endeavor to save his life.

INDECENT ASSAULT ON A FEMALE.

On at , A., unlawfully and indecently did assault B., a female.

INDECENT ASSAULT ON A MALE.

On at , A., a male person unlawfully and indecently did assault B., another male person.

ASSAULT CAUSING ACTUAL BODILY HARM.

On at , A., did make an assault upon and beat and occasion actual bodily harm to B.

AGGRAVATED ASSAULT.

On at , A., in and upon B., did make an assault, with intent then and there to commit an indictable offence, namely, [*Describe the indictable offence intended.*]

OR,

On at , A., in and upon B., a public officer (*or* "a peace officer") then and there engaged in the execution of his duty, did unlawfully make an assault.

OR,

On at , A., in and upon B., did unlawfully make an assault, with intent then and there to resist (*or* "prevent") the lawful apprehension (*or* "detainer") of him the said A., (*or* "one C.") for a certain offence, to wit, [*State the offence.*]

OR,

On at , A., did unlawfully make an assault upon B., who was then and there, in his quality of a duly appointed Bailiff of , engaged in the lawful execution of a certain process against (*or* "in the making of a lawful seizure of") lands (*or* "goods.")

OR,

On at , A., did unlawfully make an assault upon B., a duly appointed Bailiff of , with intent to rescue certain goods then and there taken and held by the said B., under legal process (*or* "distress" *or* "seizure.")

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(1) For definition of "shipwrecked person," see article 3 (*x*), *ante*, p. 6.

OR,

At on , a day whereon a poll for the election of municipal councillors, for the municipality of , was being proceeded with, A., being then and there, within two miles from the place where such poll was being held, did unlawfully make an assault upon and beat B

KIDNAPPING.

On at , A., unlawfully forcibly and without lawful authority, did kidnap B., and did, then and there unlawfull forcibly and without lawful authority seize, confine and imprison him the said B., within the Dominion of Canada, with intent to cause the said B., to be secretly confined and imprisoned in Canada aforesaid, against the will of the said B., (*or* "with intent to cause the said B., to be unlawfully sent and transported out of Canada aforesaid.")

COMMON ASSAULT.

On at A., assaulted and beat B.

RAPE.

On at , A., in and upon B., a woman, who was not his wife, did unlawfully make an assault, and did then and there unlawfully ravish and have carnal knowledge of her the said B., without her consent.

OR,

On at , A., did unlawfully have carnal knowledge of B., a woman who was not his wife, with consent then and there by him, the said A. obtained from the said B., unlawfully, and by threats, (*or* "unlawfully and by personating the husband of the said B." *or* "by false and fraudulent representations as to the nature and quality of the act.")

ATTEMPT TO COMMIT RAPE.

On at , A., in and upon B., a woman, who was not his wife, did unlawfully make an assault, with intent then and there to unlawfully ravish and have carnal knowledge of her the said B., without her consent.

CARNALLY KNOWING A GIRL UNDER FOURTEEN.

On at , A., did unlawfully have carnal knowledge of B., a girl under the age of fourteen years, to wit, of the age of thirteen years and six months.

ATTEMPT TO CARNALLY KNOW A GIRL UNDER FOURTEEN.

On at , A. did unlawfully attempt to have carnal knowledge of B., a girl under the age of fourteen years, to wit, of the age of thirteen years and six months.

ABORTION.

On at , A., with intent thereby to procure the miscarriage of a certain woman to wit, one B., did unlawfully administer to (*or* "cause to be taken by") her the said B., a certain drug (*or* "a certain noxious thing") to wit. [*Describe the drug or noxious thing used, and mention the quantity.*]

OR,

On at , A., with intent thereby to procure the miscarriage of a certain woman, to wit, one B., did unlawfully use upon the person of the said B., a certain instrument, to wit, [*Describe the instrument used.*]

OR,

On at , A., a woman, did, with intent thereby to procure her own miscarriage, unlawfully administer (*or* " permit to be administered ") to herself a certain drug (*or* " a certain noxious thing ") to wit, [*Describe the drug or noxious thing, and mention the quantity used.*]

OR,

On at , A., unlawfully did supply (*or* " procure ") a certain drug (*or* " a certain noxious thing ") to wit, [*Describe and mention the quantity of it*] he the said A., then knowing that the same was intended to be unlawfully used or employed with intent to procure the miscarriage of a certain woman, to wit, one B.

OR,

On at , A., unlawfully did supply (*or* " procure ") a certain instrument to wit, [*Describe the instrument*], he the said A., then knowing that the same was intended to be unlawfully used or employed with intent to procure the miscarriage of a certain woman, to wit, one B.

BIGAMY.

On at , A., being already theretofore, married to and having as and for his lawful wife (*or* " her lawful husband "), one B., did unlawfully marry and go through a form of marriage with and take to wife (*or* " husband ") another woman, (*or* " man "), to wit, C., and, to her (*or* " him ") the said C., was then and there married, the said B., his, the said A's, said first wife (*or* " her, the said A's, said first husband ") being still alive.

PROCURING A FEIGNED MARRIAGE.

At on , A., did unlawfully procure a feigned and pretended marriage between himself, the said A., and a certain woman, to wit, B.

OR,

At on , A., did unlawfully aid and assist B., in procuring a feigned and pretended marriage between him, the said B., and a certain woman, to wit, C.

POLYGAMY.

At on , and on and at divers other days and times before and since that date, A., a male person, and B., C. and D., three females, unlawfully did practice, (*or* " agree and consent to practice ") polygamy together.

OR,

At on , A., a male person, and B., C., and D., three females, did unlawfully, by mutual consent, enter into a form of polygamy together.

OR,

At on , A., did unlawfully enter into a form of polygamy with certain women, to wit, B., C., and D., by mutual consent between him the said A., and them the said B., C., and D.

OR,

At on , and on and at divers other days and times before that date, A., unlawfully, did practice (*or* "agree and consent to practice") polygamy with certain women, to wit, B., C., and D.

OR,

At on , A.. a male person, and B., C., and D., three females, did unlawfully enter into a conjugal union (*or* "spiritual or plural marriage," etc.) together, by means of a contract (*or* "the rites" *or* "rules," etc., "of a certain denomination," (*or* "sect" *or* "society) called Mormons,) (*or* "called" etc.)

SOLEMNIZING MARRIAGE, WITHOUT AUTHORITY.

On at , A.. without lawful authority, did unlawfully solemnize (*or* "pretend to solemnize") a marriage between B. and C.

OR,

On at , A., then knowing that B. was not lawfully authorised to solemnize a marriage between C., and D., did unlawfully procure the said B. to unlawfully solemnize a marriage between the said C. and D.

SOLEMNIZING A MARRIAGE CONTRARY TO LAW.

At on , A., a clergyman of , having lawful authority to solemnize marriages, did, then and there, a marriage between B., and C., solemnize, unlawfully and in violation of the laws of the province of , in which the said marriage was so solemnized, to wit, by solemnizing the same without any previous publication of banns, and without any license in that behalf, (*or*, [*Set out particular violation complained of.*]

ABDUCTION.

On at , A., unlawfully did take away (*or* "detain") against her will, a certain woman, to wit, B., with intent to marry (*or* "carnally know") the said B.,

OR,

On at , A., unlawfully did take away (*or* "detain"), against her will, a certain woman, to wit, B., with intent to cause her the said B., to be married to (*or* "carnally known by") C.

ABDUCTION OF AN HEIRESS.

On at , A., from motives of lucre, did unlawfully take away (*or* "detain." *or* "take away and detain") against her will, a certain woman, to wit, B., she then having a certain legal (*or* "equitable") present absolute, (*or* "future absolute" *or* "future conditional" *or* "contingent") interest in certain real (*or* "personal") estate, to wit, (*describe the estate or property*) with intent to marry (*or* "carnally know") the said B.

OR.

On at A., from motives of lucre, did unlawfully take away (*or* "detain" *or* "take away and detain") against her will, a certain woman, to wit B., she then having a certain legal (*or* "equitable") present and absolute, (*or* "future absolute" *or* "future conditional" *or* "contingent") interest in certain real (*or* "personal") estate, to wit,

(*Describe the estate or property*) with intent to cause her the said B. to be married to (*or* carnally known by") C.

OR.

On at , A , from motives of lucre, and with intent to marry (*or* "carnally know") a certain woman, to wit, B., did unlawfully take away (*or* "detain") against her will, her the said B., she then being a presumptive heiress (*or* "co-heiress" *or* "presumptive next of kin") to C., a person then having a certain legal (*or* "equitable") present absolute, (*or* "future absolute," *or* "future conditional" *or* "contingent") interest in certain real (*or* "personal") estate, to wit, (*Describe the estate or property*).

OR.

On at , A., from motives of lucre, and with intent to cause a certain woman, to wit, B., to be married to (*or* "carnally known by") C., did unlawfully take away (*or* "detain") against her will, her the said B., she then being a presumptive heiress (*or* "co-heiress" *or* "presumptive next of kin") to C., a person then having a certain legal (*or* "equitable") present absolute, (*or* "future absolute," *or* "future conditional," *or* "contingent") interest in certain real (*or* "personal") estate, to wit, (*Describe the estate or property*).

ABDUCTION OF A MINOR HEIRESS.

On at , A., with intent to marry (*or* "carnally know") a certain woman, to wit, B., then being under the age of twenty one years, did fraudulently allure (*or* "take away" *or* "detain") the said B., out of the possession and against the will of C., her father, (*or* "mother," *etc.*), she the said B. then having a certain legal (*etc.*) interest (*etc.*) in certain real estate, to wit, *etc.* (*or* "being a presumptive heiress, *etc.*, to D., a person then having a certain legal interest *etc.*, (*Follow the foregoing forms, according to circumstances*).

ABDUCTION OF A GIRL UNDER SIXTEEN.

On at , A., unlawfully did take (*or* "cause to be taken") a certain unmarried girl, to wit, B., then under the age of sixteen years, out of the possession and against the will of C., her father, (*or* "mother" *or* "a person having the lawful care and charge of her the said B.").

STEALING CHILDREN UNDER FOURTEEN.

On at , A., unlawfully did take (*or* "entice") away (*or* "detain") one B., a child under the age of fourteen years, to wit, of the age of years, with intent, thereby, then and there, to deprive C., the father (*or* "mother," *or* "guardian" *etc.*), of the said B., of the possession of the said B.

OR.

On at , A., unlawfully did take (*or* "entice") away (*or* "detain") one B., a child under the age of fourteen years, to wit, of the age of years, with intent, thereby, then and there, to steal a certain article (*or* "certain articles), to wit, (*Mention the article or articles*) then being on or about the person of the said B.

OR.

On at , A., unlawfully did receive (*or* "harbor") one B., a child under the age of fourteen years, to wit, of the age of years, then and there knowing the said B. to

have been then and there and theretofore taken (*or* "enticed") away, with intent to deprive C., the father (*or* "mother," *or* "guardian" *etc.*) of the said B., of the possession of the said B.

EXTORTION BY DEFAMATORY LIBEL.

On at , A. unlawfully did publish (*or* "threaten to publish" *or* "offer to abstain from publishing" *etc.*) a defamatory libel of and concerning B., with intent, thereby, then and there to extort money from the said B., (*or* "from C.")

OR,

On at A. unlawfully did publish (*or* "threaten to publish," *or* "offer to abstain from or prevent the publishing of") a defamatory libel of and concerning B., with intent thereby, then and there, to induce the said B., (*or* "one C"), to confer upon, (*or* "procure for") the said A., (*or* "one D.") a certain appointment (*or* office") of profit (*or* "trust"), to wit, [*Mention the appointment or office in question.*]

OR,

On at A. unlawfully did publish (*or* "threaten to publish") a defamatory libel of and concerning B., in consequence of the said A. having been refused money theretofore demanded by him the said A. of and from the said B. (*or* "in consequence of the said A. having been refused a certain appointment, *etc.*, theretofore sought by him the said A., of or from or at the hands or by the influence of the said B.")

PUBLISHING A LIBEL KNOWING IT TO BE FALSE

On at A. unlawfully did publish in a certain newspaper called the a defamatory libel, on, of and concerning B., he the said A. well knowing the same to be false, which libel was contained in the said newspaper in an article therein headed (*or* "commencing with") the following words, to wit, [*Set out the heading, or the commencing, and, if necessary, the concluding, words of the libel, or otherwise give so much detail as is sufficient to furnish the accused with reasonable information as to the part of the publication to be relied on against him*], and which libel was written in the sense of imputing that the said B. was. [*As the case may be.*]

PUBLISHING A LIBEL.

On at A. unlawfully did publish on, and of and concerning B., a defamatory libel in a certain letter directed to C., which libel was in the words following that is to say [*Set out the part of the letter complained of as libellous*], and which libel was written in the sense of imputing that the said B. was [*As the case may be.*]

SPECIAL PLEA.

And, without waiver of his plea of not guilty, the said A., for a further plea in this behalf, says that Our Lady the Qu-en ought not further to prosecute the said indictment against him, because he says it is true that [*and so on, stating facts showing the truth of every matter charged in the alleged libel*]; and so the said A. says that the said alleged libel is true in substance and in fact. And the said A., further says that the said alleged libel was and is matter of public interest and concern and that before and at the time of publishing the said alleged libel, it was for the public benefit that the matters contained therein should be published, to the extent that the same were published by him the

said A., because [*Set out the facts showing that the publication was for the public benefit*] And this he the said A. is ready to verify, *etc.*

REPLICATION.

And as to the second plea of the said A., the said J. N. (*the Clerk of the Crown*) who prosecutes for our said Lady the Queen in this behalf, says that our said Lady the Queen ought not, by reason of anything in the said second plea alleged, to be barred or precluded from prosecuting the said indictment against the said A., because the said J N. says that he denies the said several matters in the said second plea alleged, and says that the same are not, nor are, nor is any or either of them, true, etc. And this he the said J. N. prays may be enquired of by the country, etc.

CRIMINAL INFORMATION, EX OFFICIO.

Be it remembered that J. T., Attorney-General of Our present Sovereign Lady the Queen, who, for Our said Lady the Queen, in this behalf, prosecutes in his proper person, comes here into the Court of at . And, for Our said Lady the Queen, gives the Court to understand and be informed that at on A., unlawfully, and wickedly, intending devising and contriving to raise, create and cause a tumult, disturbance and serious riot among Her Majesty's subjects, did unlawfully and wickedly publish a defamatory libel, of a violent and inflamatory nature of and against certain of Her Majesty's subjects to wit ; (*Mention the persons or class of persons libelled, and set out the libel complained of, as in an indictment.*) Whereupon the said Attorney-General for Our said Lady the Queen prays the consideration of the Court here in the premises and that due process of law may be awarded against him the said A., in this behalf, to make him answer to Our said Lady the Queen touching and concerning the premises aforesaid.

CRIMINAL INFORMATION BY CLERK OF THE CROWN.

Be it remembered that J. N., Clerk of the Crown of Our Sovereign Lady the Queen in the Court of who for our said Lady the Queen, prosecutes in this behalf, comes here into the said Court at on the : And for our said Lady the Queen gives the Court here to understand and be informed that A. at on did unlawfully (*etc.*) [*State the offence and proceed as in an indictment*] Whereupon the said Clerk of the Crown for our said Lady the Queen prays the consideration of the Court here in the premises, and that due process of law may be awarded against him the said A. in this behalf to make him answer to our said Lady the Queen touching and concerning the premises aforesaid.

PLEAS TO CRIMINAL INFORMATION.

And the said A., appears here in Court by his attorney and the said information is read to him which being by him heard he says he is not guilty of the said supposed offence in the said information alleged etc.

And for a further plea the said A., saith that before the publishing of the said alleged libel [*Set out facts showing the truth of the matters charged in the libel.*]

And so the said A., says that the said alleged libel consists of allegations true in substance and in fact and of fair and reasonable comments thereon. And the said A., further saith that at the time of publishing the said alleged libel it was for the public benefit that the matters therein contained should be published; because [*Set out the facts showing why the publication was for the public benefit.*] And so the said A., says that he published the said alleged libel, as he lawfully might, for the causes aforesaid, and this he the said A., is ready to verify. Wherefore he prays judgment, etc.

REPLICATION.

The said J. N., Clerk of the Crown of our said Lady the Queen in the said Court of , who prosecutes for our said Lady the Queen, as to the first plea pleaded, puts himself upon the country; and, as to the plea secondly pleaded by the said A., says that the said A., of his own wrong and without the cause in the said plea alleged, published the said libel as in the said information alleged, etc.

TABLE OF OFFENCES UNDER TITLE V.

INDICTABLE OFFENCES.

No.	Art.	Offence.	Punishment.	Tribunal.
1	215	Neglecting duty to provide necessaries	Three years	General or Quarter Sessions.
2	216	Abandoning children under two years of age	Three years	do
3	217	Causing bodily harm to apprentices or servants	Three years	do
4	231	Murder	Death	Sup. Court. Cr. Juris.
5	232	Attempt to commit murder	Life	do
6	233	Threats to murder	Ten years	do
7	234	Conspiracy to murder	Fourteen years	do
8	235	Accessory after the fact to murder	Life	do
9	236	Manslaughter	Life	Gen. or Quarter Sess.
10	237	Aiding and abetting suicide	Life	do
11	238	Attempt to commit suicide	Two years	do
12	239	Neglecting to obtain assistance in child birth	Life or Seven years	do
13	240	Concealing dead body of child	Two years	do
14	241	Wounding with intent	Life	do
15	242	Unlawful wounding	Three years	do
16	243	Shooting at H. M's vessels. Wounding public officer	Fourteen years	do
17	244	Disabling or dragging with criminal intent	Life and whipping	do
18	245	Endangering life by poison, etc	Fourteen years	do
19	246	Administering poison with intent to injure	Three years	do
20	247	Causing bodily injuries by explosives	Life	do
21	248	Attempting bodily injury by explosives	Life or fourteen years	do
22	249	Setting spring guns and man traps	Five years	do
23	250	Intentionally endangering persons on railways	Life	do
24	251	Negligently endangering persons on railways	Two years	do
25	252	Negligently causing bodily injury	Two years	do
26	253	Injuring persons by furious driving	Two years	do
27	254	Preventing the saving of person shipwrecked	Seven years	do
28	256	Sending unseaworthy ships to sea	Five years	do
29	257	Taking unseaworthy ships to sea	Five years	do
30	259	Indecent assaults on females	Two years and whipping	do
31	260	Indecent assault on males	Ten years and whipping.	do
32	262	Assault causing actual bodily harm	Three years	do
33	263	Aggravated assaults, assault on public or peace officer, etc	Two years	do
34	264	Kidnapping	Seven years	do
35	265	Common assault	One year or $100 fine	(1) do
36	267	Rape	Death or life imprisonment	Sup. Court. Cr. Juris.
37	268	Attempt to commit rape	Seven years	do

(1) This offence is also triable in a summary manner, and is then punishable by a fine of $20 and costs, or two months imprisonment, with or without h. l.

TABLE OF OFFENCES UNDER TITLE V.—*Continued.*

INDICTABLE OFFENCES.

No.	Art.	Offence.	Punishment.	Tribunal.
38	269	Defiling girl under fourteen	Life and whipping	Gen. or Quarter Sess.
39	270	Attempt to defile girl under fourteen.	Two years and whipping	do
40	271	Killing unborn child	Life	do
41	272	Procuring abortion	Life	do
42	273	Woman procuring her own miscarriage	Seven years	do
43	274	Supplying means of procuring abortion	Two years	do
44	276	Bigamy	Seven years (second offence fourteen years)	do
45	277	Feigned marriages	Seven years	do
46	278	Polygamy	Five years and $500 fine.	do
47	279	Solemnization of marriage without lawful authority	Fine (1) or two years or both	do
48	280	Solemnization of marriage contrary to law	Fine (1) or one year	do
49	281	Abduction of a woman	Fourteen years	do
50	282	Abduction of an heiress	Fourteen years	do
51	283	Abduction of an unmarried girl under sixteen	Five years	do
52	284	Stealing children under fourteen	Seven years	do
55	300	Extortion by libel	Two years, or $600 fine, or both	Sup. Court. Cr. Juris.
56	301	Publishing libel knowing it to be false.	Two years, or $400 fine, or both	do
57	302	Defamatory libel	One year, or $200 fine, or both	do

Note. It will be understood that with regard to offences mentioned in this Table as triable in a Sup. Court of Cr. Juris, those offences cannot be tried in a Court of General or Quarter Sessions, and that, with regard to offences mentioned therein as triable in a Court of General or Quarter Sessions, the latter Court has not exclusive jurisdiction over these offences, but that, in relation to them, its jurisdiction is concurrent with that of the Superior Courts of Cr. Juris.

See article 958, *post*, which empowers the Tribunal, in addition to the infliction of punishment, to order security for the convicted offender's future good behaviour, and also provides that, on conviction for any offence punishable with imprisonment for five years or less, the offender may be fined, in addition to or in lieu of any punishment otherwise authorized.

It will be seen that, under article 783, *post*, whenever a person is charged before a magistrate with having committed an aggravated assault or with having committed an assault upon any female whatsoever, or upon any male child under fourteen, or with having assaulted, obstructed, molested or hindered any peace officer or public officer in the lawful performance of his duty, the magistrate may, subject to the provisions of part LV, try the charge summarily.

See also article 785, *post*, which *in regard to the Province of Ontario*, gives a Police Magistrate or Stipendiary magistrate power to try summarily, *with the accused's consent*, any person charged before him with any offence triable in a Court of General or Quarter Sessions.

(1) See article 934 *post*, as to regulation of fine.

Sub-section 2 of article 784, *post*, provides that,—in the case of any seafaring person, transiently in Canada, being charged,—within the Cities of Quebec or Montreal or other seaport cities or towns in Canada,—with the commission therein of any offence mentioned in article 783, *post*, (amongst which offences are included aggravated assaults, assaults upon any female whatsoever, assaults upon any male child under fourteen, and the assaulting, obstructing, molesting or hindering any peace officer or public officer in the lawful performance of his duty,—the summary jurisdiction of magistrates shall be absolute; and sub-section 3 of article 784, *post*, makes the jurisdiction of a stipendiary magistrate in the Province of Prince Edward Island and of a magistrate in the District of Keewatin absolute, in respect of the above mentioned offences.

See comments under article 265, *ante*, pp. 183 and 184.

NON-INDICTABLE OFFENCES.

No.	Art.	Offence.	Punishment.	Tribunal.
1	255	Leaving unguarded holes in ice and excavations	Fine or imprisonment, with or without h. l. or both. (1)	Summary.
2	265	Common assault	$20 fine or 2 months with or without h.l. (2)	do

See remarks, at pp. 183 and 184, *ante*, with reference to powers (under article 783, *post*) of summary trial by magistrates of certain indictable offences, including aggravated assault, etc.; and also see article 784, with regard to absolute jurisdiction of magistrates to summarily try such charges under certain special circumstances.

LIMITATION OF TIME FOR PROSECUTING OFFENCES UNDER TITLE V.

Article 279. Unlawfully solemnizing marriage. Two years. See article 551 (*b*), *post*.

Article 930 prescribes, by two years, all actions, suits or informations (not otherwise expressly limited), when the same are for the recovery of the penalties or forfeitures referred to in article 929, *post*.

See article 841, *post*, which (in all cases not otherwise limited) limits the time, for the commencement of the prosecution of any offence punishable on summary conviction, to six months from the time when the matter of complaint or information arose, except in the North West Territories, where the limitation (in such cases when not otherwise provided for) is *twelve* months.

(1) See articles 934 and 951, *post*, as to regulation of fine and imprisonment.
(2) This is also an indictable offence. See p. 182, *ante*.

TITLE VI.

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

Upon the subject of this Title the Royal Commissioners, in their report upon the English Draft Code, have the following special remarks:—

" Offences against rights of property must be committed, either, by wrongfully taking property, by fraudulently deceiving the owners of property, or, by the mischievous destruction of property ; in other words, by THEFT, by CHEATING, or, by MISCHIEF.

" Theft may be either *simple* or *aggravated*. *Simple theft* is so closely connected with certain kinds of fraud that the two subjects run into each other. *Theft aggravated by violence* is either *robbery* or *extortion ;* and theft accompanied by wilful trespass on a dwelling-house is either *burglary* or *house-breaking*.

" The receiving of goods dishonestly obtained is usually associated with theft.

" Mischief is a distinct subject, and follows fraud.

" The present title includes and re-enacts, in substance, the provisions of the Larceny Act, the Forgery Act, the Coinage Offences Act, and the Malicious Mischief Act, (24-25 Vict., cc. 96, 97, 98, 99). (1) It also includes some provisions, less comprehensive, which occur in other Acts,—in particular the provisions of two sections of the Post Office Act, (7 Will. 4 & 1 Vict., c. 36, ss. 28, 47), (2) part of the Trade Marks Act, (25-26 Vict., c. 88), (3) the Personation Act. (37-38 Vict.,, c. 36), (4) and the provisions of the Fraudulent Debtors' Acts for England and Ireland, (32-33 Vict., c. 62, and 35-36 Vict., c. 57). (5)

" The changes made by the present title relate, principally, to the *common law*, as to theft, The present statute law is substantially contained in the 24-25 Vict., c. 96 : which recognizes and continues the old, (and, as it seems to us unreasonable), distinctions between stealing animals *ferae naturae*, or things attached to or savoring of the realty, (which were not at common law the subject of larceny,) and stealing other property.

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(1) The corresponding Canadian Acts are R.S.C., c. 164 ; c. 165 ; c. 167 ; and c. 168.
(2) R.S.C., c. 35, ss. 79, 80, 81, 83, 88, 90.
(3) 51 Vict., c. 41, ss. 2, 5, 19, 20, 21, 22. (Dom.)
(4) R.S.C., 165, ss. 9, 41.
(5) R.S.C. 173, ss. 27, 28.

"There is good reason for holding that capturing wild animals in the enjoyment of their natural liberty, though on another's land, should not be considered stealing; but, why should stealing one of the deer or valuable foreign birds in the Zoological Gardens be treated differently from stealing a sheep or a hen? And, why should it be a different offence to steal a log of timber from that which it is to cut down the tree and carry it away?

"Again, the old law as to stealing required that the property should be taken out of the possession of the owner. This rule gave rise to many complicated and highly artificial decisions; and some statutes have included, amongst thieves, bailees, servants and others who, having lawfully obtained possession of property, were not within the old definition, though they fraudulently appropriated to their own use the property entrusted to them; but many persons equally culpable are still beyond the reach of the criminal law; so that a person, who finds a purse and appropriates it, under circumstances involving all the moral guilt of theft, may, on technical grounds, escape all criminal liability.

"It is proposed to simplify the law by putting an end to all these distinctions, which are very subtle, and, many of them, arbitrary.

"The things which, according to the common use of the word *steal*, are capable of being stolen, but which, at *common law*, are *not* the subjects of larceny, may be described as, *first*, certain animals; *secondly*, documents evidencing certain rights; and *thirdly*, land and things fixed to or growing out of it.

"As to animals, one rule of the existing law is founded on the principle that to steal animals used for food or labor is a crime worthy of death, but that to steal animals kept for pleasure or curiosity is only a civil wrong. The principle has long since been abandoned; sheep stealing being no longer a capital offence; and dog stealing is a statutory offence. But the distinction [above referred to] still gives its form to the law, and occasionally produces results of a very undesirable kind. It was held, lately, for instance, that as a dog is not the subject of larceny, at common law, it was not a crime to obtain, by false pretences, two valuable pointers. (1)

"It seems, to us, that this rule is quite unreasonable, and that *all* animals, which are the subject of property should also be the subject of larceny.

"This, however, suggests the question, what wild animals are the subject of property, and how long do they continue to be so?

"This question must be considered in reference to living animals, *feræ naturæ*, in the enjoyment of their natural liberty; living animals, *feræ naturæ*, escaped from captivity; and *pigeons*, which, singularly enough, form a class by themselves.

"The existing law, upon this subject, is that a living wild animal, *in the enjoyment of its natural liberty*, is not the subject of property;

(1) R. v. Robinson, Bell 34.

but that, *when dead*, it becomes the property of the person on whose land it dies, in such a sense that he is entitled to take it from a trespasser, but not in such a sense that the person who took it away, on killing it, is guilty of theft. This is specially important in reference to game. *This state of the law we do not propose to alter.*

"As to living animals, *feræ naturæ*, in captivity, we think they ought to be capable of being stolen. When such an animal escapes from captivity, it appears to us that there arises a distinction which deserves recognition. If the animal is one which is commonly found in a wild state in this country, it seems reasonable that on its escape it should cease to be property. A person seeing such an animal in a field may have no reasonable grounds for supposing that it had just escaped from captivity. If, however, a man were to fall in with an animal imported at great expense, as a curiosity, from the interior of Africa he could hardly fail to know that it had escaped from some person to whom it would probably have a considerable money value. We think that not only a wild animal in actual captivity, but also a wild animal,—which has once been captured,—should, on escaping from confinement, be the subject of larceny, unless it be an animal commonly found, in a wild state, in this country.

"Pigeons, while in a dovecot, or farmyard, ought obviously to be as much capable of being stolen as poultry. But, suppose they are away from their home, and are not distinguishable from wild pigeons? The law upon this point is not quite clear. It appears, from section 23 of 24 & 25 Vict. c. 96, that a bird so situated is not the subject of larceny, as that Act imposes a penalty of forty shillings on persons killing pigeons '*under such circumstances as shall not amount to larceny at common law;*' and no other circumstances can be imagined to which these words would apply. These distinctions will be found to be embodied in section 245. (1)

"The rules that documents evidencing certain rights, and that land and things *savoring of the realty* are not capable of being stolen appear to us wholly indefensible.

"It is no doubt physically impossible to steal a legal right or to carry away a field, but this affords no ground at all for the rule that it shall be legally impossible to commit theft upon documents which afford evidence of legal rights, or upon things which, though fastened to, growing out of, or forming part of the soil, are capable of being detached from it and carried away.

"These rules have been qualified by statutory exceptions so wide and intricate that they are practically abolished, but they still give form to a considerable part of the law of theft, and occasionally produce failure of justice in cases in which the statutory exception is not quite co-extensive with the common law rule. *These rules we propose to abolish absolutely.*"

(1) See article 304, *post*, which contains the same distinctions and provisions.

PART XXIV.

THEFT.

303. Things capable of being stolen.—Every inanimate thing whatever which is the property of any person, and which either is or may be made movable, shall henceforth be capable of being stolen as soon as it becomes movable, although it is made movable in order to steal it : Provided, that nothing growing out of the earth of a value not exceeding twenty-five cents shall (except in the cases hereinafter (1) provided) be deemed capable of being stolen.

This article is identical with section 244 of the English Draft Code.

Opposite to the above proviso the Royal Commissioners have a marginal note, as follows :

" The existing law is shortly this ; At common law nothing which grows out of or is fixed to the earth is the subject of larceny. But by 24-25 Vict., c. 96, s. 33, punishments are provided for stealing trees, saplings and shrubs, of the value of more than one shilling ; by section 36, *all plants whatever* growing in gardens, etc., are protected : and, by section 37, (2) all plants cultivated for any of the purposes specified in the text of the section, wherever they may grow, are protected. These provisions appear substantially to make all vegetable productions the subject of larceny, except things worth less than one shilling growing elsewhere than in gardens, and not cultivated for the purposes mentioned.

304. Animals capable of being stolen.—All tame living creatures, whether tame by nature or wild by nature and tamed, shall be capable of being stolen ; but tame pigeons shall be capable of being stolen so long only as they are in a dovecote or on their owner's land.

2. All living creatures wild by nature, such as are not commonly found in a condition of natural liberty in Canada, shall, if kept in a state of confinement, be capable of being stolen, not only while they are so confined but after they have escaped from confinement.

3. All other living creatures wild by nature shall, if kept in a state of confinement, be capable of being stolen so long as they remain in confinement or are being actually pursued after escaping therefrom but no longer.

4. A wild living creature shall be deemed to be in a state of confinement so long as it is in a den, cage or small enclosure, stye or tank, or is otherwise so situated that it cannot escape and that its owner can take possession of it at pleasure.

5. Oysters and oyster brood shall be capable of being stolen when in oyster beds, layings, and fisheries which are the property of any person, and sufficiently marked out or known as such property.

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(1) See articles 341 and 342, *post*.

(2) These sections 33, 36 and 37 of the Imperial Statute, 24-25 Vict, c. 96, correspond with sections 19, 23, and 24 of R.S.C., c.164, (now repealed).

6. Wild creatures in the enjoyment of their natural liberty shall not be capable of being stolen, nor shall the taking of their dead bodies by, or by the orders of, the person who killed them before they are reduced into actual possession by the owner of the land on which they died, be deemed to be theft.

7. Every thing produced by or forming part of any living creature capable of being stolen, shall be capable of being stolen.

This article is to the same effect as section 245 of the English Draft Code.

Opposite to the clause corresponding with sub-section 4, the Royal Commissioners, have the following note :

" This is intentionally worded so as not to include deer in a large park."

Larceny at common law.—The word " Larceny " is derived from "*larcyn*" (Norm. Fr.) and "*latrocinium*" (Lat.); and simple larceny, that is, larceny at common law, or, as Blackstone (1) calls it, "plain theft, unaccompanied with any other atrocious circumstance," is generally defined as the wrongful taking and carrying away of the personal property of another, with a felonious intent to convert it to the taker's own use, without the consent of the owner. (2)

" It is essential to larceny at common law that there should be a felonious *taking;* which has been understood to mean a taking out of the possession of the owner. This rule has given rise to vast technicality.

" First, there is the question, what is the precise meaning of the word *taking* or *carrying away*, considered as a physical operation; and there are many cases, on this point, which run into very minute distinctions. On the whole it is thought desirable to require that, in order to constitute theft *by taking*, there should be at least an actual moving of the thing stolen. The existing law on that point is accordingly unaltered by the Draft Code. This is a matter of small importance as such questions arise very rarely.

" Technicalities of more importance connected with *taking* are those which have led to the distinction between theft and embezzlement.

" The immediate consequence of the doctrine that a *wrongful taking* is of the essence of theft, is, that, if a person obtains possession of a thing innocently, and afterwards fraudulently misappropriates it, he is guilty of no offence.

" This doctrine has been qualified by a number of statutory exceptions, each of which has been attended with difficulties of its own.

" The *first of these exceptions* is contained in the statute which provides that a clerk or servant, or person employed in the capacity of a clerk or servant, who embezzles property received on behalf of his master shall be deemed to have stolen it. This enactment was

(1) 4 Bl. Com. 229.

(2) See Hamman's case, 2 Leach C. C. 1089; Reg. v. Thurborn, 1 Den. C. C. 388; Reg. v. Middleton, L. R. 2 C. C. 48, 60, 66; Reg. v. McGrath, L. R. 1 C. C. 205, 210; Reg. v. Jones, 2 C. & K. 236.

interpreted as creating a new offence distinct from ordinary theft; and a great number of cases involving considerations technical and subtle to the last degree have been decided on various points connected with it; and it was found necessary for the legislature to interfere further in order to prevent many failures of justice.

"Clerks and servants, however, formed only one class of persons who had opportunities of committing breaches of trust for which the common law provided no punishment. Bankers, merchants, brokers, solicitors, factors and other agents might and did commit similar offences; and *another great exception* in the rule of the common law was made to include such cases.

"These enactments are elaborate and intricate, and present special difficulties of their own. The existing law will be found in 24-25 Vict., c. 96. ss. 75 and following. (1) The first Act on the subject was passed in the reign of George III.

"The case of bailees, singularly enough, remained unprovided for after the rest: and a carrier stealing a parcel entrusted to him for carriage committed no crime till the fraudulent conversion of chattels, money and valuable securities by bailees was made larceny, by 20-21 Vict., c. 54. (See now 24-25 Vict., c. 96, s. 3.) (2)

"The common law rule,—though thus nearly eaten up by exceptions,—still survives as to all persons who come innocently into possession of the property of others, otherwise than as clerks, servants, bankers, merchants, brokers, solicitors, factors, and other agents and bailees. The case of the finder of goods, already referred to, furnishes an instance.

"This state of the law is, obviously, most objectionable, not only on account of its extreme intricacy and technicality, but also because the numerous exceptions made to the common law rule are inconsistent with the principle on which that rule depends.

"We have therefore defined theft in such a manner as to put *wrongful taking* and *all* other *means of fraudulent* misappropriation on the same footing.

"The definition, *properly expounded* and *qualified*, will, we think, be found to embrace every act which, in common language, would be regarded as theft, and it will avoid all the technicalities referred to as arising out of the common law rules, as well as out of the intricate and somewhat arbitrary legislation, the course of which we have sketched above.

"The provisions of the Bill on this subject differed considerably,—in language,—from those of the Draft Code; but they were framed with the same objects, and would have effected the same objects in another way. The Bill treated theft, criminal breach of trust, and obtaining money by false pretences as *three* ways of committing *one* offence—termed '*fraudulent misappropriation.*' These were so defined

(1) R.S.C. c. 164, ss. 59-76.
(2) R.S.C. c. 164, s. 4.

that they would have covered the same ground as theft, false pretences and criminal breach of trust as defined by the Draft Code; but many things, which, according to the Draft Code, are theft, would according to the Bill have been criminal breaches of trust.

"The Draft Code defines the offence of *obtaining* property *by false pretences* substantially in accordance with the present law, and '*criminal breach of trust*' is retained as a distinct offence. The other cases of '*fraudulent misappropriation*' are denominated '*theft.*'

"The crimes of *obtaining* goods, money, or credit *by false pretences*, and of *criminal breach of trust* are, in point of mischief and moral guilt, much the same as theft, but, from their nature they require separate clauses to define them.

"The crime of embezzlement, wherever the subject matter of it is a chattel or other thing which is to be handed over in specie, will come within the definition of theft; but where the subject matter is not to be handed over in specie, but may be accounted for by handing over an equivalent, it requires separate provisions, which will be found in sections 249, 250, and 251. (1)

"It is essential to all these offences that there should be the *animus furandi*,—that guilty intention which makes the difference between a trespass and a theft." Eng. Commrs' Rep.

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

(1) The equivalents of these sections 249. 250, and 251, of the English Draft Code are articles 308, 309, and 310, *post*.

pledging or giving a lien on any goods or document of title to goods intrusted to him for the purpose of sale or otherwise, for any sum of money not greater than the amount due to him from his principal at the time of pledging or giving a lien on the same, together with the amount of any bill of exchange accepted by him for or on account of his principal.

6. Provided, that if any servant, contrary to the orders of his master, takes from his possession any food for the purpose of giving the same or having the same given to any horse or other animal belonging to or in the possession of his master, the servant so offending shall not, by reason thereof, be guilty of theft. R.S.C., c. 164, s. 66.

The phrase "*without color of right*," forming part of the above definition of theft, seems to be intended to take the place of the word *feloniously* which in connection with the definition of larceny is usually said to mean "without color of right." (1)

From the definition itself, and from the explanations given by the Royal Commissioners in their report upon the subject, it will be seen, that, theft is no longer restricted to what, under the common law, constituted the offence of stealing or larceny,—the principal ingredient of which was as we have seen the physical asportation or taking or carrying away of personal property out of the possession and against the will of the owner,—but that it is extended to and made to cover all other means of fraudulent misappropriation; so, that, theft, as a general term, will now include every thing and every act amounting to larceny under the common law, as one of the different ways in which the offence of theft may be committed. But whether the act be a taking of the thing out of the owner's possession or a conversion of it while in the offender's lawful possession, the essence of the offence will still be the intent with which the act is done. For instance, if A. were to place his horse and cart opposite to B's door, and B., not wishing to have them there, were to lay hold of the horse and lead it away, and leave it and the cart at a short distance from where it originally stood, there would be a taking by B. of the horse and cart into his temporary possession, but no conversion and no intent to deprive A. of his property, B's intent being merely to remove the horse and cart from opposite to B's door, (where they were in A's possession), to another place away from B's door, where they still remain in A's possession.

If the sheep of A. stray into the flock of B., and B. not knowing it, drive them home along with his own flock, and shear them, this is no theft; but it would be otherwise if B. did any act for the purpose of concealing the sheep of A.; for that would indicate that he knew them to be the sheep of another. (2)

If, under color of having a claim for arrears of rent, A. distrains the cattle of B. his tenant, this may amount to a civil wrong,—a trespass, for instance under the common law of England as to civil matters,—but no theft. (3)

If A. having done work upon an article, returns it to B. the owner, and then, on a dispute arising between them as to the price to be paid for the work, A. takes and carries off the article against B's will, honestly intending to hold it as security for the amount which is alleged to be due to him, this is no theft, although in fact it turn out that there was nothing due to him. (4) The facts in that case were these; A. had been instructed by B's wife to repair an umbrella. After the repairs were finished, and it had been returned to B's wife, a dispute arose as to the bargain made. A. thereupon carried away the umbrella as

(1) R. v. Thurborn, 1 Den. 388; 2 C. & K. 831; 18 L. J. (M. C.) 140; R. v. Guernsey, 1 F. & F. 394.
(2) Hale, 506.
(3) 1 Hale, 509.
(4) R. v. Wade, 11 Cox 549.

security for the amount alleged by him to be due for repairing it. Blackburn, J., left it to the jury to say whether the taking was an honest assertion of right, or only a colorable pretence to obtain possession of the umbrella. Verdict, not guilty.

A. and B. took two horses out of C's stable at night without his leave, and, having ridden them a distance of about thirty miles, left them at an inn desiring care to be taken of them and saying that they should return in three hours. A. and B. were taken the same day at a distance of fourteen miles from the inn walking in a direction from it. The jury returned a verdict of guilty, but at the same time found specially that A. and B. meant merely to ride the horses the thirty miles and to leave them there without an intention to return them or otherwise dispose of them. Ten of the judges held that this was no larceny as there was no intention in the prisoners to change the property or make it their own. (1)

Where the servant of a tanner took out of his master's warehouse dressed skins of leather with intent to bring them in and charge them as his own work (which they were not), and to get paid by the master for them, it was held no larceny. (2)

A., was supplied by B., his master with pig iron to put into a furnace to be melted. he, A., being paid according to the weight of the metal which ran out of the furnace into bars. A., put in other iron belonging to B., whereby the weight of the melted iron being thus increased he gained a larger remuneration. *Held*, that if A., did this with the felonious intent of converting the iron to a purpose for his own profit it was larceny. (3)

A., took away goods belonging to B., a young woman for the mere purpose of inducing her to call upon him for them, so that he might have an opportunity of soliciting her to commit fornication with him. *Held* not to be a felonious taking. (4)

Where a person stole some goods and also took a horse, to enable him to get off more conveniently with the goods but not to steal it, it was held not to be a felonious stealing of the horse. (5)

A., met B., whom A., knew to be a poacher and seized him; B., being rescued, seized A's gun and ran away with it, and was subsequently heard to say that he would sell it, and the gun was never afterwards heard of. Vaughan B., upon an indictment for stealing the gun told the jury that it would not be larceny if B., took the gun under an impression then on his mind that it might be used by A., so as to endanger his B's life, and not with an intention of disposing of it, although he might afterwards have determined to dispose of it. The jury found that B., had no intention to dispose of the gun at the time he took it, and acquitted him. (6) This would now be *theft by conversion* under the above article 305.

A., to screen B., an accomplice who was indicted for horse stealing broke into C's stable where the horse was and took it away and backed it into a coal-pit and killed it. It was contended at the trial that this was not larceny because the taking was not with an intention to convert the horse to the use of the taker, A., *animo furandi et lucri causâ*. A majority of seven judges held it to be larceny, and six of that majority were of opinion that to constitute larceny it was not essential that the property should be taken *lucri causâ*, if it be fraudulent and with intent to wholly deprive the owner of the property: but

(1) R. v. Philips, 2 East P. C. 662, 663.
(2) R. v. Holloway 1 Den. 370; 2 C. & K. 942; 18 L. J. (M. C.) 60; R. v. Poole Dears. & B. 345; 27 L. J. (M. C.) 53.
(3) R. v. Richards, 1 C. & K. 532.
(4) R. v. Dickinson, R. & R. 420.
(5) R. v. Crump, 1 C. & P. 658.
(6) R. V. Holloway 5 C. P. 524.

some of the majority even thought that the object A., had in view was a benefit, and that therefore the taking was *lucri causâ*. (1)

The prisoners, who were farm servants, opened the granary of their master by means of a false key, and took thereout two bushels of beans to give to their master's horses, *in addition to the quantity* usually allowed. This was held by a majority of the judges to be larceny : it was said by some of the judges that the additional quantity of beans would diminish the work of the men who had to look after the horses, and that, therefore, the *lucri causâ*, to give themselves ease, was an ingredient in the offence. (2) Cases of this kind are now expressly excepted : it being declared by subsection 6 of the above article 305 that if any servant, against his master's orders, takes from the master's possession any food to give to any of the master's horses or other animals such servant shall be guilty of no offence.

The Imperial Statute, 26 and 27 Vict., c. 103, s. 1, enacts in effect that, if any servant contrary to his master's orders gives any food belonging to the master to any of the master's horses or other animals, the servant shall not be guilty of felony, but shall be liable to summary conviction and three months imprisonment or a fine not exceeding £5.

Under subsection 4 of article 305 *theft by taking* is committed as soon as the offender moves the thing, or causes it to move or to be moved, or begins to cause it to become movable, with intent to steal it.

This is somewhat similar, though perhaps a little wider, than the common law rule under which a bare removal of the thing was sufficient to make it larceny. (3) For instance, if a man were leading another's horse out of a field and were apprehended while doing so, or if a guest stealing goods in an inn had removed them from his chamber downstairs, it was, under the common law, a sufficient taking to constitute larceny. (4)

Where a thief intending to steal some plate took it out of a chest in which it was and laid it down upon the floor, but was surprised before he could make off with it, it was held a sufficient taking; (5) and where, with the intention of stealing a cask of wine, the thief removed it from the head to the tail of the wagon upon which it lay, it was also held sufficient. (6)

A. drew a book from B's inside pocket, so that the book was about an inch from the top of the pocket, when B. suddenly put up his hand, upon which, while the book was still about B's person, A. let go his hold of the book and it fell back into B's pocket. *Held*. a sufficient asportation to constitute larceny. (7)

The transfer, by a letter-carrier, of a letter from his pouch to his pocket was held a sufficient asportation. (8)

Where the thief was unable to carry off the goods on account of their being attached by a string on the counter, (9) or to carry off a purse on account of some keys attached to the strings of it getting entangled in the owner's pocket, (10) it was held in these cases that there was not a sufficient carrying away to constitute larceny, but that to render the asportation complete in such cases

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(1) R. v. Cabbage, R. & R. 292

(2) R. v. Mortitt, R. & R. 307 ; See R. v. Gruncell, 9 C. & P. 365 ; R. v. Handley C. & Mar. 547 ; R. v. Privett, 1 Den. 193 ; 2 C. & K. 114.

(3) 4 Bl. Com. 231.

(4) 3 Inst. 108, 109.

(5) R. v. Simpson, Kel. 31 ; 1 Hawk., c. 33, s. 25.

(6) R. v. Walsh, 1 Moo. C. C. 14

(7) R. v. Thompson, 1 Moo C. C. 78.

(8) R. v. Poynton, L. & C 247 ; 32 L. J. (M. C.) 29.

(9) *Anon*, 2 East, P. C. 556.

(10) R. v. Wilkinson, 1 Hale, 508.

there must be a severance. (1) It would seem likely, however, that under subsection 4 of article 305 these cases may, now, be held to be covered, so as to make them *theft by taking;* for that subsection makes it a sufficient taking as soon as the offender moves the thing, or causes it to move, or begins to cause it to be movable.

Of course, under the common law, whenever there was no asportation, the offender might be prosecuted for an attempt to steal, which under the common law was a misdemeanor, or he could, upon an indictment for the larceny, be convicted of the attempt only, under Imperial statutory law to that effect.

The following cases seem to have been decided upon the principle that, there was not only the intent to deprive the owner of his property, but that, although there was in some cases, what seemed to be a parting with the possession of the goods or money, there was no real parting with possession, but that at the time of the actual taking of it by the offender, the property and possession still remained in reality, with the owner, either on account of their being some trick used by the offender or of the parting with the goods being by some servant of the owner, without any authority or power to do so, or on account of the thing being, strictly speaking, still in the owner's physical possession, as, by being on his counter at the time of being picked up, by the taker, although the picking up was not interfered with, but even acquiesced in by the owner's employee.

ILLUSTRATIONS.

A, having a deposit of eleven shillings in a post office savings bank, and, having obtained a warrant to withdraw ten shillings of it, went to the post office, where he presented the warrant, with his deposit book, to B., the clerk of that department, who by mistake instead of looking at the letter of advice for ten shillings connected with A's warrant, referred to another letter of advice,—one for £8 – 16 – 10,—and under this mistake, he placed on the counter this larger sum of money which A. took up; and, after B. had entered the amount, £8 – 16 – 10, in the deposit book as paid, A. went away, taking the money with him. At the trial the jury found that A. had the *animus furandi* at the moment of taking up the money from the counter and returned a verdict of guilty. *Held* by a majority of the judges, eleven in number (Cockburn, C J., Boville, C. J., Kelly, C. B., Pigott, B., Blackburn, Mellor, Lush, Grove, Denman, Archibald and Keating, JJ., that A. was rightly convicted of larceny; and they supported this holding on various grounds; 1, that the postmaster-general, through B., the clerk, had by mistake, formed a mere intention to pass over the property in the money to A, but that this mistaken intention did not actually pass it, and that A. was aware of the mistake and had the *animus furandi* at the time he took up the money; 2 that B. the clerk having only a limited authority under the letter of advice for the smaller amount of money had no authority to part with the property in the larger amount to A.; and 3, that possession of the money was not completely parted with when it was placed on the counter, and when A with the *animus furandi* took it up. Four of the judges, Martin, B., Bramwell, B., Brett, J., and Cleasby, J., held on the other hand, that the money was not taken *invito domino* and that therefore there was no larceny. Bramwell, B., and Brett, J., held further that the authority of B., the clerk authorised the parting with the possession and property in the entire sum laid down on the counter. (2)

Where a hosier by the defendant's desire took a parcel of silk stockings to his lodgings and out of them the defendant picked out six pairs which were laid on the back of a chair, and the defendant then sent the hosier back to his store for some articles and while he was absent absconded with the stockings; the

(1) 2 Russ. Cr. 6.
(2) R. v. Middleton, L. R. 2 C C. R. 38; 42 L. J. (M. C.) 73.
See also R. v. Hollis, 12 Q. B. D. 38.

judges held this to be larceny, the defendant having clearly obtained the goods *animo furandi*. (1)

Where the defendant obtained the mail bags from the post office, pretending that he was the mail guard, and then ran away with them, the jury, being of opinion that he obtained possession of them with intent to steal them, found him guilty; and the judges up held the conviction. (2) In this case the property in the mail bags did not pass, for the postmaster had no property in them to part with. (3)

Where the defendant, *animo furandi* obtained goods from the servant of a carrier, by falsely pretending to be the person to whom the goods were directed it was holden to be larceny; because the servant had no authority to part with the goods to any but the right person. (4)

A carrier's servant left goods at the defendant's house by mistake but without any inducement from the defendant, who afterwards knowing that they had been left there by mistake and did not belong to him, converted them to his own use. *Held* to be larceny. (5)

Where A., intending to sell his horse, sent B., his servant with it to a fair but B., had no authority to sell or deal with it in any way; and C. by fraud induced B., to part with possession of the horse under color of an exchange for another intending all the while to steal it, it was held to be larceny. (6)

It is clear that, under the common law not only was it no larceny if the owner himself of his own free-will parted with the property in the goods taken; (7) but the same principle applied whenever the servant from whom goods were obtained had a general authority to act for his employer, and while acting under such general authority willingly parted with the goods; the person to whom they were thus delivered not being guilty of larceny.

For instance, where a person obtained money from the cashier of a bank by presenting, knowing it to be forged, a forged order purporting to be drawn by one of the bank's customers, it was held not to be larceny; because the cashier voluntarily parted with the money, and was acting within the scope of his general authority. (8)

Where the defendant bought goods and desired them to be sent with a bill and a receipt, and the shopman, who brought them, left them upon the defendant handing him two bills, which turned out to be mere fabrications, the judges held this not to be larceny, because the prosecutor had parted with the property, as well as the possession, upon receiving what was deemed at the time by his servant to be payment. (9)

Where a pawn-broker's clerk, who had a general authority from his master, to act in his business, delivered up a pledge upon receiving a parcel which he supposed to contain diamonds, and under that belief parted with the pledge entirely, but the parcel contained stones of no value, it was held to be no larceny. (10)

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(1) R. v. Sharples, 1 Leach, 93; 2 East P. C. 675.
(2) R. v. Pearce, 2 East P. C. 603.
(3) 2 East P. C. 673.
(4) R. v. Longstreeth, 1 Moo. C. C, 137.
(5) R. v. Little, 10 Cox 559.
(6) R. v. Sheppard, 9 C. & P. 121.
(7) R. v. Macgrath, L. R. 1 C. C. R. 205; R. v. Lovell, 8 Q. B. D. 185; R. v. Harvey, 1 Leach, 467; 2 East, P. C. 689; R. v. Adams, R. & R. 225; R. v. Coleman, 2 East, P. C. 672; R. v. Thomas, 9 C. & P. 741; R. v. Atkinson, 2 East, P. C. 673; R. v. Adams, 1 Den. 38; Arch. Cr. Pl. & Ev. 21 Ed. 385, 386.
(8) R. v. Prince, 1 C. C. R. 205; R. v. Lovell, 8 Q. B. D. 185.
(9) R. v. Parkes, 2 Leach, 614; 2 East, P. C. 671; Arch. Cr. Pl. & Ev. 386.
(10) R. v. Jackson, 1 Moo. C. C. 119; see R. v. Barnes, 2 Den. 59; 20 L. J. (M. C.) 34; R. v. Essex, Dears. & B. 371; 27 L. J. (M. C.) 20.

Where a person, having the *animus furandi*, obtained possession of goods by means of some trick or artifice, it was considered larceny, under the common law, even though there was an actual delivery, if the owner did not intend to part with his entire right of property, but only with the temporary possession of the goods.

A., at a race meeting, made a bet with B., laying odds on a certain horse, and the money for which B. backed the horse was deposited with A. The horse won, but while the race was being run, A. fraudulently went off with the money. *Held*, that as it appeared that B. parted with his money intending, in the event of the horse winning, that it should be repaid, while A. obtained it fraudulently, never intending to deliver it back, in any event, there was no contract by which the property in the money could pass to A., and that, therefore, there was evidence of larceny by a trick. (1)

A. agreed to discount for B. a bill which was given for that purpose to A., who told B. that if he then sent a person with him to his lodging he would pay over the amount less discount and commission; a person was sent, accordingly, but upon reaching his lodgings A. left the messenger there and went out on pretence of getting the money, and never returned. The judge left it to the jury to say whether A obtained possession of the bill with intent to steal it and whether B. meant to part with his property in the bill before he should have received the money for it. The jury found in the affirmative on the first proposition and in the negative on the second, and found A. guilty. Conviction upheld. (2)

Where A. obtained from B., a silversmith, two cream-ewers, in order that C., a customer of the silversmith, with whom A. said he lived, might select one, and absconded with them, it was held to be larceny, because the possession only, and not the right of property, was parted with. (3)

A. offered to give B. gold for bank notes, and, on B. laying down some bank notes for the purpose of having them changed into gold, A. took them up and went away with them, promising to return with the notes, but he never returned. Wood B. said the property in the notes had never been parted with at all, and left it to the jury to say whether A. had the *animus furandi* at the time when he took the notes, and said that if they were of that opinion there was a larceny. (4)

A. went to B's shop and said C. wanted some shawls to look at. B. gave her A., five shawls, which she converted to her own use. *Held* that as the property in the shawls would continue in B. until the selection would be made by C., it was larceny if C. did not send for them; but there being no evidence that C. did not send for them, A. was acquitted, because it was assumed, in the absence of such evidence, that C. did send for the shawls, that A. therefore received the shawls properly, and only conceived the design of wrongfully converting them to her own use after she had rightfully obtained possession. (5) This would now be *theft by conversion* under article 305. (See subsection 3)

A prevailed on B. a tradesman, to take goods to a certain place, where he said the price would be paid for them, and afterwards induced him to leave the goods in the care of C. from whom A. got them without paying the price. B. swore that he did not intend to part with the goods until they were paid for; and the jury found that A. *ab initio* intended to get the goods without paying for them. *Held* to be larceny. (6)

A. and B. ordered goods of C. who sent them to their house by his, C's,,

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(1) R. v. Buckmaster, 20 Q. B. D. 182; 57 L. J. (M. C.) 25.
(2) R. v. Aickles, 2 East, P. C. 673; 1 Leach, 294.
(3) R. v. Davenport, M. S., 1 Arch. Peel's Acts, 5.
(4) R. v. Oliver, 4 Taunt 274; 2 Leach, 1072; see R. v. Rodway, 9 C. & P. 784.
(5) R. v. Savage, 5 C. & P. 143.
(6) R. v. Campbell, 1 Moo. C. C. 179.

servant, D., with strict injunctions not to part with them without receiving the price. A. and B. gave D. a cheque which they knew to be worthless upon which D. left the goods. *Held* to be larceny. (1)

If B. the owner, had himself carried the goods and parted with them in the way in which his servant did, no doubt it would have been a case of false pretences; or if the servant had had a general authority to act it would have been the same as if B. himself had acted; but the servant had only a limited authority which he chose to exceed. (2)

A., who had bargained for goods for which, by the custom of trade, the price should have been paid before they were taken away, took them away without the consent of B. the owner, and at the time he bargained for them A. did not intend to pay for them but meant to get them into his own possession and dispose of them for his own benefit. *Held* to be larceny. (3)

Where A., intending *ab initio* to get goods by fraud, had them put into his cart upon the express condition that they should be paid for before being taken out of the cart, and then took them out of the cart without paying for them. *Held* to be larceny. (4)

A. in presence of B. picked up, in the street, a purse containing a receipt for £147, for a "*rich brilliant diamond ring*," and also the ring itself. It was then proposed that the ring should be given to B. on his depositing his watch and some money, as a security that he would return the ring as soon as his proportion of the value should be paid to him by A. Accordingly B. deposited his watch and money, which were taken away by A's confederates. The ring turned out to be worth only ten shillings and the watch and money were never returned. It was left to the jury to say whether or not this was an artful and preconcerted scheme to get possession of B's watch and money: and the jury, finding that it was so, convicted A. (5)

In another case on the defendant being convicted under the same circumstances as the above, the case was reserved for the opinion of the judges, nine of whom were of opinion that this practice of *ring dropping* amounted to larceny; and they distinguished it from the case of a loan in this that although, in *ring dropping* cases. the possession was parted with, the property was not. (6)

A gypsey who obtained and kept money or goods by a false pretence of witchcraft, the person from whom she obtained them merely intending to part with the possession and expecting them to be returned, was held guilty of larceny. (7)

Where A., in presence of B., picked up a purse containing a watch chain and two seals which A. and a confederate represented to be gold and worth £18, and B. purchased A's share for £7, intending to part with the property in the money as well as the possession of it, Coleridge, J. held that this was not larceny. (8)

Where A., by means of what is known as the *purse trick*, induced B. to give him a shilling for a purse by showing B. three shillings and then making it appear as if he, A., had dropped them into the purse whereas in fact he had only dropped in three half pence, it was held not to be larceny, but false pretences. (9)

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(1) R. v. Stewart, 1 Cox 174.
(2) Arch. Cr. Pl. & Ev. 21 Ed. 389.
(3) R. v. Gilbert, 1 Moo. C. C. 185.
(4) R. v. Pratt, 1 Moo. C. C. 250; R. v. Cohen, 2 Den. 249; See also R. v. Slowly, 12 Cox, C. C. R. 269.
(5) R. v. Patch, 1 Leach, 238.
(6) R. v. Moore, 1 Leach, 314; 2 East, P. C. 679. See also R. v. Watson, 2 Leach, 640.
(7) R. v. Bunce, 1 F. & F. 523.
(8) R. v. Wilson, 8 C. & P. 111.
(9) R. v. Solomons, 17 Cox, C. C. R. 93.

A. B. and C. decoyed D. into a public-house, and there introduced a card game called *cutting*, and one of them prevailed on D., who did not play on his own account, to cut the cards for him, and then under pretence that D. had cut the cards for himself, and lost, another of them swept his money off the table and went off with it. This was considered to be a case in which it should be left to the jury to determine *quo animo* the money was obtained, and that it would be larceny should they find that the money was obtained upon a preconcerted plan to steal it. (1)

A., at a fair, agreed to sell a horse to B. for £23, of which £8 was to be paid to A., down, and the balance upon delivery. B. handed £8 to A. who signed for it a receipt stating that the balance was to be paid upon delivery. A never delivered the horse to B. but caused it to be removed from the fair under circumstances shewing that he never intended to deliver it. *Held* that A. was rightly convicted of larceny of the £8, by a trick, on the ground that B. had no intention to part with his property in the £8 until A. had fulfilled his part of the bargain, which he never intended to do. (2)

A. induced B., by fraud, to buy from him a dress, at the price of 25 shillings, he having promised that if she would do so he would give her another dress worth twelve shillings, and he then took out of her hand a guinea, she being taken by surprise, and neither consenting nor resisting, and he gave her a dress worth much less than a guinea, and refused to give her the other dress which he had promised. It being found by the jury that this was part of A's scheme to obtain the money by means of a pretended sale, it was held to be larceny. (3)

A. went into a shop and asked for change for half a crown and the shopman gave him two shillings and sixpence; A. then held out the half crown and the shopman just took hold of it by the edge but never actually got it into his custody, and A. ran away with the change and the half crown. *Held* to be larceny, but Parke, J. doubted whether an indictment would lie for stealing the half crown. (4)

A. and B. went into C's shop; A. put down six pence in silver and six pence in copper, and asked C. to give him, in exchange for that money, a one shilling piece, upon which C. took, from her money drawer, a one shilling piece which she put on the counter beside A's money; A. while all the money lay there then said, to C., that she might as well take the whole of the money thus laying on the counter and give him a two shilling piece for it. C. thereupon took a two shilling piece, from her drawer and put it on the counter, expecting to receive for it two shillings of A's money. A then picked up the two shilling piece and went away with it. C. did not discover her mistake till she was putting the coins from the counter into the money till: but at the same moment B. distracted her attention by asking the price of some article. *Held*, that C. never intended to part with her property in the two shilling piece till she should receive two shillings of A's money, and that the offence was larceny. (5)

In another *ringing the changes* case A. and B. fraudulently induced C., a barmaid, to pay over to them money of her master without having received from them the proper change, and having no intention of or knowledge that she was so doing; *Held*, guilty of larceny. (6)

Where an *automatic box*, the property of a company, was placed in a public passage, and was so constructed that, upon a penny being placed in it, through a slot, a cigarette was ejected from it, and the prisoner, instead of putting a

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(1) R. v. Horner, 1 Leach, 270; Cald. 205. See also, R. v. Robson, R. & R. 413.
(2) R. v. Russell, (1892) 2 Q. B. 312.
(3) R. v. Morgan, Dears. 395.
(4) R. v. Williams, 6 C. & P. 390.
(5) R. v. McKale, L. R., 1 C. C. R 125; 37 L. J. (M. C.) 97.
(6) R. v. Hollis, 12 Q. B. D.; 53 L. J. (M. C.) 38.

penny in the box put into it a metal disc of the size of a penny, and so obtained a cigarette, he was held guilty of larceny. (1)

Where A. hired a horse of B., he, A., stating that he did so for the purpose of taking a journey; and it turned out that instead of going the journey A. sold the horse in Smithfield market on the same day, it was left to the jury to say whether he hired the horse for the purpose of stealing it or whether he hired it really for the purpose of taking the journey and afterwards changed his intention; and the jury, being of the former opinion, found him guilty. Seven of the judges were afterwards clearly of opinion that the offence was larceny. (2) And the same thing was held where the defendant hired the horse in the name of another person. (3) And where the defendant hired a post-chaise, with intent to convert it to his own use, and never returned it; upon being indicted for it twelve months afterwards, as for a larceny, it was held that it clearly amounted to that offence, although the vehicle was not hired for any definite time. (4)

It seems, however, that, in order to constitute a larceny at common law by a party to whom goods had been delivered on hire, there must have been not only an original intention to convert them to his own use but a subsequent *actual* conversion; and a mere agreement by the hirer to accept a sum offered for the goods by a third party, who, however, did not intend to purchase, unless his suspicions as to the honesty and right of the vendor to sell were removed, was held not to amount to such a conversion. (5)

Where the prisoner went to an inn on a fair day, and desired the ostler to bring out his horse and upon the ostler saying he did not know which was his horse, went into the stable, and pointing to a mare, said it was his, and the ostler brought out the mare which the prisoner attempted to mount, but could not, the mare being frightened: upon which he desired the ostler to lead the mare out of the yard, which was done; but, before he could mount, the prisoner was detected and secured, Garrow, B., held this to be larceny, (6)

With regard to larceny of lost things, the general rule, under the common law, seems to have been that if a person found goods which had been actually lost or reasonably supposed by him to have been lost, and appropriated them, with intent to take the entire dominion over them, really believing, when he took them, that the owner could *not* be found, it was not larceny; but if he took them with the like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner *could* be found, it was larceny. (7) It was necessary that the prisoner, *at the time of finding*, should believe that the owner could be ascertained, and without this, an intention to appropriate, at the time of the finding, did not make the prisoner guilty of larceny, although he ascertained the name of the owner before converting to his own use. (8)

It will be seen that, now, under article 305, a finder of lost goods will render himself liable to prosecution for *theft by conversion*, if after finding the goods he discover the name of the owner and do not restore them, but converts them to his own use, although at the time of finding them he neither knew the owner nor believed nor had reasonable grounds for believing that the owner could be found.

The following are some of the cases decided under the old rule.

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(1) R. v. Hands, 16 Cox, C. C. R., 188.
(2) R. v. Pear, 1 Leach. 212; See R. v. Banks, R. & R. 441.
(3) R. v. Charlewood, 1 Leach 409; 2 East P. C. 689.
(4) R. v. Semple, 1 Leach 420.
(5) R. v. Brooks, 8 C. & P. 295.
(6) R. v. Pitman, 2 C. & P. 423.
(7) 3 Inst., 108; 1 Hawk. c. 33, s. 2.
(8) R. v. Thurborn, 1 Den. 388; 2 C. & K. 831; 18 L. J. (M. C.) 140; R. v. Dixon, Dears. 580; 25 L. J (M. C.) 39; R. v. Christopher, Bell, 27; 28 L. J. (M. C.) 35; R. v. Kerr, 8 C. & P. 176; R. v. Reed, C. & Mar. 306; R. v. York, 1 Den. 335; R. v. Matthews, 12 Cox, C. C. R. 489.

On an indictment for stealing a bank note the jury found that the prosecutor had dropped the note in defendant's shop; that defendant had found it there; that at the time he picked it up he did not know, nor had he reasonable means of knowing who the owner of it was; that he afterwards acquired knowledge who the owner was, and that after that he converted it 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 discovered. Held*, that, upon these findings the defendant was rightly convicted. (1)

A purchaser at the prisoner's stall left his purse in it. A stranger pointed out the purse to the prisoner, supposing it to be hers, and reproved her for carelessness, when the prisoner put it in her pocket, and afterwards concealed it. On the return of the owner, the prisoner denied all knowledge of it. Upon an indictment for larceny, the jury found that the prisoner took up the purse, knowing that it was not her own, intending at the same time to appropriate it to her own use, but that she did not know, then, who was the owner. She was held properly convicted, and that the purse so left was not lost property, but mislaid. (2)

A's child, having found six sovereigns in the street, brought them to A., who counted them and told some bystanders that the child had found a sovereign. A. and her child then went down the street to the place where the child had picked up the money, and found a half-sovereign and a bag. About two hours afterwards, A. was told that a woman had lost some money, upon which she told her informant to mind her own business, and gave her half a sovereign.

Held by the majority of the Irish Court of Criminal Appeal, that this case could not be distinguished from R. v. Glyde, *post*; that there was nothing to show that, at the time the child brought her the money, A. knew that it had an owner, or, to show that she was under the impression that the owner could be found; and her conviction for larceny was quashed. (3)

A. put 900 guineas in a secret drawer in a bureau, and died. B., her son and executor, lent the bureau to his brother, C., who, after keeping it several years, sold it to D., who gave it out to be repaired by E., who found the money. *Held* to be such a taking, by E., out of the possession of A., as to constitute larceny. (4)

If a cabman converted to his own use a parcel left by a passenger in his cab, by mistake, it was larceny, by the common law, if he knew the owner, or if he took him or set him down at a particular place where he could have enquired for him. (5)

A. found a sovereign on the highway, believing it had been accidentally lost, but, with a knowledge that he was doing wrong, he at once determined to appropriate it, notwithstanding that it should become known to him who the owner was. The owner was speedily made known to A., who however refused to deliver up the sovereign. There was no evidence that he believed, at the time of finding the sovereign that A. could ascertain who the owner was, and he was therefore held not guilty of larceny. (6) Under article 305, sub-section 3, this would now be theft by conversion.

In every case where the property was not, properly speaking, lost, but only *mislaid*, under circumstances which would enable the owner to know where to look for and find it, the person finding and appropriating property so mislaid

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(1) R. v. Moore, L. & C. 1; 30 L. J. (M. C.) 77.
(2) Reg. v. West, 1 U. C. L. J. 17; 24 L. J. (M. C.) 4.
(3) R. v. Deaves, 11 Cox, 227. See also, R. v. Knight, 12 Cox, C. C. R. 102.
(4) Cartwright v. Green, 8 Ves. 405; 2 Leach, 952.
(5) R. v. Wynne, 2 East P. C 664; 1 Leach, 413; R. v. Lambe, 2 East P. C. 664; R. v. Lear, 1 Leach. 415 *n.*
(6) R. v. Glyde, L. R. 1 C. C. R. 139; 37 L. J. (M. C.) 107.

was held guilty of larceny under the common law. This was the principle upon which R. v. West, (*supra*), was decided. (1)

A bought a bureau at an auction and afterwards discovered in a secret drawer of it a purse of money, which he appropriated to his own use. *Held* that if he had express notice that the bureau only, and not its contents if any, were sold to him, or, if he had no reason to believe that any thing more than the bureau itself was sold the abstraction of the money was a felonious taking, and amounted to larceny, but that if he had reasonable ground for believing that he bought the bureau with its contents, if any, he had a colorable right to the property, and there was no larceny. (2)

A., a boy, found a lost cheque, which B., by some pretence, got from him, and kept in hopes of obtaining a reward, but not being satisfied with the reward offered by the owner he refused to deliver it either to the owner or to A. Held that B. could not be convicted of stealing the cheque either from the owner or from A. (3)

It will be seen that the subject of larceny, or, as we may now call it, *theft by taking* is intimately connected with the doctrine of property, and more particularly with that part of it which relates to possession; in reference to which Sir James F. Stephen makes the following useful remarks;

"I do not think it would be possible to assign to the expressions '*possession*,' '*actual possession*,' '*constructive possession*,' and '*legal possession*,' senses which would explain and reconcile all the passages in which these phrases occur in works of authority. . . . . However, though it is impossible either to justify the manner in which the word 'possession' is used, or to free it entirely from the fictions with which it has been connected, it is, I think, not impossible to define it in such a manner as to express all the distinctions which it is intended to mark in language differing very slightly, if at all, from that which has generally been used upon the subject.

As I have shewn in the articles on theft, and in the notes upon them, there are five different ways in which theft can he committed, viz:

1. By taking and carrying away goods which do not belong to the thief from any place where they happen to be.
2. By converting property entrusted by the owner to a servant.
3. By obtaining the possession of property (as distinguished from the right of property) from the owner by fraud with intent to convert it
4. By converting property given by the owner to the thief under a mistake.
5. By converting property bailed to the thief.

It will be found upon consideration that the distinctions between these cases all arise out of the doctrine of possession, but it is, I think, less generally perceived that the important point is not the taking out of the possession of the owner, but the taking into the possession of the thief. The five cases in question may be thus arranged:—

In No. 1 (common larceny) the thief has neither the possession nor the custody of the stolen property at the time when the theft is committed, and it is immaterial whether the owner has it or not.

In No. 2 (larceny by a servant) the thief at the time of his offence may have either the custody or the possession. If he has the custody, his offence is theft. If he has the possession his offence is embezzlement.

In No. 3 (larceny by trick) the thief obtains the possession by a mistake, caused by his own fraud.

In No. 4 (larceny by taking advantage of a mistake) the thief receives the possession by a mistake not caused by his own fraud.

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(1) Arch. Cr. Pl. & Ev. 21 Ed. 384.
(2) Merry v. Green, 7 M. & W. 623; 10 L. J. (M. C.) 164.
(3) R. v. Gardner, L. & C. 243; 32 L. J. (M. C.) 35.

In No. 5 (larceny by a bailee) the thief receives the property under a contract of bailment * * * *

Passing from the law upon this subject let us examine the facts to which the law applies—the different relations, which as a fact, exist between men and things—in reference to the common use of language.

The most obvious case of possession is that of a person who holds something in his hand. But neither this nor any other physical act can be accepted as more than an outward symbol of the state of things which the word denotes. Unless the article possessed is very small, part of it only can be held in the hand, trodden on by the foot, or so dealt with by any other part of the possessor's body, as to exclude a similar dealing with it by others. It would, therefore, I think, be felt by every one that neither actual bodily contact with an object, nor even exclusive bodily contact with it, was essential to what, in the common use of language, was meant by possession. No one would think of using different words to express the relation of a man to a coin clenched in his fist, to a pocket book in his pocket, to a portmanteau of which he carried one end and a railway porter the other, to a carriage in which he was seated whilst his servant was driving it, to a book on the shelves of his library, and to the plate in his pantry under the charge of his butler. He would, in the common use of language, be said to be in possession of all these things, and no one would feel any difficulty in perceiving the correctness of the expression, even if it were added that he was not the owner of any one of them, that some had been lent, and others let to hire to him. On the other hand, any one, but a lawyer, would be surprised at the assertion that a man, whether the owner or not, was in possession of a watch which he had dropped into the Thames, of sheep which had been stolen from his field and driven to a distance by the thief, of a dead grouse, which, having been wounded at a distance from his moor had managed to reach it and die there, without his knowledge, or that of any other person.

The common feature of all the cases to which the word 'possession' would obviously be applicable is easily recognized. It is to be found in the fact, that the person called the possessor has, in each instance, the power to act as if he were the owner of the thing possessed, whether he actually is the owner or not. Several of the illustrations given, however, show that though this is one of the things which the word conveys, it is not the only thing conveyed by it. The butler in charge of the plate, the porter helping to carry the portmanteau, the coachman who is driving the coach, have the physical power of acting as the owner of those things as much as their master or employer. Indeed, in two of the three cases their physical control over the object is more direct than his. The difference is that the circumstances are such as to raise a presumption that their intention is to act under the orders of their superior, and that he (at least for the present) has no definite superior whose orders he intends to obey. Take, for instance, the case of a dinner party; there is no visible difference between the master of the house and his guests; each uses the article which he requires for the moment, and they are, from time to time, removed from place to place by the servants; as however the master retains throughout not merely the legal right to dispose of them absolutely, but the immediate means of enforcing that right if from any strange circumstance it should become necessary to do so, the assertion that the plate is in his possession, and that his guests and servants have merely a permission to use it under his control, has a plain meaning; nor would that meaning be altered or obscured if the fact were added that the plate did not belong to the master of the house, but was hired by him for the occasion. Indeed, if he had stolen the plate, or received it knowing it to be stolen, the fact denoted by the word 'possession' would remain. These illustrations, which might be multiplied to any extent, appear to me to shew clearly that possession means, in the common use of language, a *power to act as the owner* of a thing, coupled with a presumable intention to do so in case of need; and that the custody of a servant, or person in a similar position, does not exclude the possession by another, but differs from it in the presumable intention of the custodian to act under the orders of the possessor with reference to the thing possessed, and to give it up to him if he requires it. Thus far, I think, my definitions correspond

with the common use of language, though of course popular language upon such a subject is not, nor is there any reason why it should be, minutely exact.

I will now compare it with the way in which the word is used by legal authorities. I know of no set dissertations on the subject of the use of the word 'possession' in English law like those which are to be found in abundance upon the corresponding word in Roman law. It would be an endless and a useless labour to go through the cases in which the word has been used, endless on account of their great number, useless because it is the characteristic of English judges to care little for technical niceties of language in comparison with substantial clearness of statement in reference to the actual matter in hand. Upon such a matter as this accordingly, it is better to consider the different authorities in groups than individually.

Possession, in reference to the subject of theft, is usually divided into two branches,—*actual* possession and *constructive* possession.

It seems to have been pretty generally assumed that the words, '*actual* possession,' were sufficiently plain for practical purposes without further explanation; but it would be easy to show, by a multitude of cases, that, *actual* possession, differs from *possession*, as I have defined it, only in one point. It is usual to say that a thing in possession of a servant is only *constructively* in the possession of the master. But the expression '*constructive* possession' has another meaning besides this. As it was considered necessary that a thing stolen should be taken out of the possession of the owner, and as, in very many instances, goods are stolen which are not in any natural sense in the possession of any one whatever, it has become a maxim that goods are always in the possession of the owner if not in his *actual*, then in his *constructive* possession, or, as it is sometimes called, his *legal* possession. Thus constructive possession means:—

1. The possession of goods in the custody of a servant on account of his master; and
2. The purely fictitious possession which the owner of goods is supposed to have, although they are, in reality, possessed by no one at all.

The phrase thus appears to me to be objectionable, not only because it is ambiguous, but, because, in the first of its two senses, it conceals a truth, whilst in the second it needlessly conveys a false impression. The truth concealed is that a man may have, and may intend to use, the power implied in the word '*possession*,' although he acts through a servant The false impression conveyed is that things cannot be out of possession, or, that, if they are, they cannot be stolen.

I avoid this by abstaining altogether from the use of the expression 'constructive possession.' In possession I include that which has to be exercised through a servant, and my language implies that a person may commit theft on objects which are not in the possession of any one at the time of the theft. The existing law may, by these means, be expressed in well recognised and established phraseology, without any resort to legal fictions.

The point upon which the most subtle questions arise as to possession is the distinction between theft and embezzlement—a perfectly useless distinction, no doubt, and one which the legislature has, on two separate occasions, vainly tried to abolish. So long, however, as it is allowed to exist, it is necessary to understand it.

I have already explained how a man may retain the possession of a thing which is not the less real or effective because he has to exercise it through the will of another person, who has undertaken to be the instrument of his will. Suppose, however, that instead of the master having given his horse to his groom or his plate to his butler, a horse-dealer has delivered the horse to the groom, or a silversmith has delivered plate to the butler for his master; I should have thought that there was no real difference between these cases; that inasmuch as the servant in each case was acting for the master in the discharge of a duty towards him, and under an agreement to execute his orders, the

master would come into possession of the horse or the plate as soon as his servant received it from the dealer or the silversmith, just as he remains in possession of the horse or the plate when he gives the custody of it to his groom or his butler. I should also have thought that the servant who appropriated his master's property to his own use, after receiving it from another on his master's account, was, for all purposes, in precisely the same position as the servant who did the same thing after receiving it from his master. The Courts, however, decided otherwise. They have held on many occasions that, though the master's possession continues when he gives the custody of a thing to his servant, it does not begin when the servant receives anything on account of his master; on the contrary, the servant has the possession, as distinguished from the custody, until he does some act which vests the possession in his master, though it may leave the custody in himself. If during that interval he appropriates the thing, he commits embezzlement. If afterwards, theft. The most pointed illustration of this singular doctrine which can be given occurs in the case of R. v. Reed. (1) B. sent. A. his servant, with a cart to fetch coals. A. put the coals into the cart, and on the way home sold some of them and kept the money. A. was convicted of larceny, and the question was whether he ought to have been convicted of embezzlement. It was held that the conviction was right, because though A. had the custody of the cart all along, yet the possession of it and its contents was in B., and though A. had the possession of the coals whilst he was carrying them to the cart, that possession was reduced to a mere custody when they were deposited in the cart, so that A.'s offence was larceny, and not embezzlement, which it would have been if he had misappropriated the coals before they were put into the cart.

. . . . . .

The technicalities on this subject appear to me to be altogether superfluous; and I think they might be easily dispensed with, by re-defining the offence of theft, or even by removing the distinction between theft, embezzlement, and false pretences." (2)

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. R.S.C., c. 164, s. 50.

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.

Offences against article 306 are punishable under article 356, *post*, which enacts that the punishment, for stealing in cases in which no punishment is otherwise provided, shall be seven years imprisonment; and ten years if the offender has been previously convicted of theft.

The stealing of cattle is punishable, under article 331, *post*, by fourteen years imprisonment; and, according to article 307, the same punishment will apply to any one *killing* cattle with intent to steal the carcase etc, thereof; and the stealing of dogs, birds and domestic animals, *etc.*, will be punishable under article 332, *post*.

Article 499, clause (B), *post*, makes it an indictable offence, punishable by fourteen years imprisonment, to wilfully *destroy* or *damage* any cattle by killing, maiming, poisoning or wounding.

See remarks under articles 331, and 332, *post*.

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(1) R. v Reed, Dears. 257,
(2) Steph. Dig. Art. 281, and *note*; Bur. Dig. 531 *et seq*.

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 or *pay* such proceeds or any part thereof, which he was required to account for or pay as aforesaid.

2. Provided, that if it be part of the said terms that the money or other thing received, or the proceeds thereof, shall form an item in a debtor and creditor account between the person receiving the same and the person to whom he is to account for or pay the same, and that such last mentioned person shall rely only on the personal liability of the other as his debtor in respect thereof, the proper entry of such money or proceeds, or any part thereof, in such account, shall be a sufficient accounting for the money or proceeds, or part thereof so entered, and in such case no fraudulent conversion of the amount accounted for shall be deemed to have taken place.

Article 3 (*cc*) *ante* defines *valuable security* as being or including 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, or Company's stock or fund etc., [British, foreign, or colonial,] or to any deposit in any savings bank or other bank, and any debenture, deed, bond, bill, note, warrant, order or other security for money or for payment of money, etc., [British foreign or colonial,] and any document of title to land 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.

309. **Theft by holder of power of attorney.**—*Every one* commits theft who, being entrusted, either solely or jointly with any other person, with any power of attorney for the sale, mortgage, pledge or other disposition of any *property*, real or personal, whether capable of being stolen or not, fraudulently sells, mortgages, pledges or otherwise disposes of the same or any part thereof or fraudulently converts the proceeds of any sale, mortgage, pledge or other disposition of such property, or any part of such proceeds, to some purpose other than that for which he was intrusted with such power of attorney. R.S.C., c. 164, s. 62.

Offences against articles 308, 309 and 310, are punishable by fourteen years, imprisonment under article 320, *post*; and article 357, *post*, provides that when, in cases of theft, the value of the article exceeds $200, two years shall be added to the term of imprisonment.

310. **Theft by misappropriating proceeds held under direction.**—*Every one* commits theft who, having received, either solely or jointly with any other person, any money or *valuable security* or any power of attorney for the sale of any *property*, real or personal, with a *direction* that such money, or any part thereof, or the proceeds, or

any part of the proceeds of such security, or such property, shall be applied to any purpose or paid to any person specified in such direction, in violation of good faith and contrary to such direction, fraudulently applies to any other purpose or pays to any other person such money or proceeds, or any part thereof.

2. Provided, that where the person receiving such money, security or power of attorney, and the person from whom he receives it, deal with each other on such terms that all money paid to the former would, in the absence of any such direction, be properly treated as an item in a debtor and creditor account between them, this section shall not apply *unless such direction is in writing.*

Article 3 (v.) defines *property* as being or including :

" (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 above articles 308, 309 and 310 are explained by the English Commissioners as follows :

" The crime of embezzlement, wherever the subject matter of it is a chattel or other thing which is to be handed over in specie, will come within the *general* definition of theft : but where the subject matter is not to be handed over in specie, but may be accounted for by handing over an equivalent, it requires *separate* provisions, which will be found in sections 249, 250 and 251." (1)

We have seen that the distinction between *theft* and *embezzlement* is dropped, and that all fraudulent misappropriations of property and breaches of trust are treated as various forms of *theft by conversion.*

Thefts by clerks, servants, bank, government, and municipal officials, and other employees are punishable, under article 319, *post,* by fourteen years imprisonment ; and criminal breaches of trust by trustees are punishable, under article 363, *post,* with seven years imprisonment.

The English Commissioners have, opposite to the section corresponding with the above article 310, a marginal reference to the cases of R. v. Cooper, and R. v. Tatlock, which are two out of a number of decisions shewing the necessity for the new provisions of law contained in the three foregoing articles.

In Cooper's case the defendant appears to have been indicted under the 75 and 76 sections of the Imperial Statute 24 & 25 Vict. c. 96. Sec 75 of that act enacts that " whosoever having been entrusted (*etc.*) *as a banker, merchant,*

(1) Articles, 308, 309 and 310, of this Code are the equivalents of sections 249, 250 and 251 of the English Draft Code.

broker, attorney, or other agent, with any money or security for the payment of money, *with any direction in writing* to apply, pay or deliver such money or security, or any part thereof respectively, or the proceeds or any part of the proceeds of such security, for any purpose, or to any person specified in such direction, shall,—in violation of good faith and contrary to the terms of such direction,—in anywise convert to his own use or benefit, or the use or benefit of any person other than the person by whom he shall have been so intrusted, such money, security or proceeds, or any part thereof respectively; and whosoever, having been intrusted, (*etc.*), *as a banker*, (*etc.*), with any chattel or valuable security, or any power of attorney for the sale or transfer of any share or interest in any public stock or fund, (*etc.*,) *without any authority to sell, negotiate, transfer or pledge* shall,—in violation of good faith, and contrary to the object or purpose for which such chattel, security or power of attorney shall have been intrusted to him,—sell, negotiate, transfer, pledge, or in any manner convert to his own use or benefit or the use or benefit of any person other than the person by whom he shall have been so intrusted, such chattel, (*etc.*), shall be guilty of a misdemeanor, etc.;" And section 76 enacts that, "whosoever *being a banker, merchant, broker, attorney or agent*, and being intrusted, either solely or jointly with any other person, with the property of any other person *for safe custody*, shall, with intent to defraud, sell, negotiate, transfer, pledge or in any manner convert or appropriate the same, or any part thereof, to or for his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted, shall be guilty of a misdemeanor," *etc.*

It appears that the defendant was an attorney, who was employed to raise money on security of property, and, having found a mortgagee willing to make the loan, he prepared the mortgage deed, got it executed by the mortgagor, obtained the money from, and handed over the deed to the mortgagee. He then paid over, to the mortgagor, a portion only of the money, and fraudulently converted the rest of it to his own use. *Held*,—upon these facts,—that as the defendant was not entrusted with the deed or the money, *for safe custody*, and, as there was *no direction in writing* to apply the proceeds of the mortgage deed, and, as the deed could not be said to have been transferred in violation of good faith and contrary to the object or purpose for which it was entrusted to him, the defendant did not come within the 75 and 76 sections of 24-25 Vic., c. 96. (1)

In Tatlock's case, the defendant was indicted, under the second clause of sec. 75 of 24 and 25 Vic., c. 96, for that, being entrusted as a broker with valuable securities for a special purpose, *without authority to sell* negociate, transfer or pledge them, he unlawfully and contrary to the purpose for which the securities were entrusted, converted to his own use a portion of the proceeds.

It appears that the defendant was an insurance broker, and, as such, had effected, for the prosecutor, some insurances on a ship; that, the ship having been lost, the prosecutor sent the policies and other documents, necessary to recover from the insurers the amount of the loss, to the defendant, who subsequently, on two different days, received cheques for the amounts of two policies; that the cheques were payable to the defendant's order, and he paid them into his own bank, to his own credit. The defendant did not pay over to the prosecutor any of the money so received by him, but gave various excuses for not doing so; and he afterwards filed a petition, for liquidation of his own affairs, in bankruptcy; his balance at his bankers, being then much less than the amount received by him on the policies. The defendant was convicted on these facts; but it was held that the conviction was wrong, on the following grounds:—by Cockburn, C. J., on the ground, that, even assuming that the defendant could have been properly convicted if there had been evidence that he received the moneys with the intention of embezzling them, he could not at any rate be convicted in the absence of such evidence and in the absence of any finding to that effect; by Kelly, C. B., and Pollock, B., on the ground that in the absence

(1) R. v. Cooper, L. R., 2 C. C. R. 123; 43 L. J. (M. C.) 89.

of evidence of the previous course of dealing between the parties and of what the duty of the prisoner was as to handing over or accounting for the money received, the conviction could not be upheld; and by Bramwell, Amphlett and Field, J. J., on the ground that the second branch of the 24 and 25 Vic., c. 96, sec. 75, applied only to the case of an agent, who,—being entrusted with securities, *without authority to obtain money upon them*,—wrongfully appropriates the securities, or wrongfully obtains money upon them and appropriates the money. (1)

These sections 75 and 76 of the above mentioned Imperial statute,—which are the same in effect as secs. 60 and 61, R. S. C. c. 164 (now repealed),—relate expressly to bankers, merchants, brokers, attorneys, and agents; and to bring an offender within the provisions thereof it appears, according to the above cases, to have been necessary, that in connection with one of the clauses, there must have been a dealing with the entrusted money, *etc.*, against the terms of some *written direction*, that in relation to another clause there must have been a selling, *etc.*, *without any authority* to do so, and that in regard to the third clause the entrusted money must have been delivered to the banker, *etc.*, *for safe custody*, in the absence of the essentials necessary to convict under the other clauses.

The law is now framed, in articles 308, 309 and 310, so as to apply not only to bankers, merchants, brokers, attorneys and agents, but to all persons whomsoever, and so that it shall not be essential (especially in connection with articles 308 and 310) that the direction, if any, should be *in writing*, nor that the conversion or other wrongful dealing must in order to be theft, be against some direction *in writing*; but that if there is no direction in writing it shall be sufficient to shew that the conversion or other wrongful dealing was against a verbal direction.

311. Theft by owners, co-owners, partners, etc.—Theft may be committed by the owner of anything capable of being stolen against a person having a special property or interest therein, or by a person having a special property or interest therein against the owner thereof, or by a lessee against his reversioner, or by one of several joint owners, tenants in common, or partners of or in any such thing against the other persons interested therein, or by the directors, public officers or members of a public company, or body corporate, or of an unincorporated body or society associated together for any lawful purpose, against such public company or body corporate or unincorporated body or society. R.S.C., c. 164, s. 58.

See article 356, *post*, as to punishment.

312. Concealing gold or silver with intent to defraud partner in mining claim.—Every one commits theft who, with intent to defraud his co-partner, co-adventurer, joint tenant or tenant in common, in any mining claim, or in any share or interest in any such claim, secretly keeps back or conceals any gold or silver found in or upon or taken from such claim. R.S.C., c. 164, s. 31.

See article 354, *post*, as to punishment.

See article 571, *post*, which authorizes the issuing of search warrants to search for gold, *etc*, alleged to be concealed.

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(1) R. v. Tatlock, 2 Q. B. D., 157; 46 L. J. (M. C.) 7. See also, R. v. White, 4 C. & P. 46; R. v. Newman, 8 Q. B. D. 706; 51 L. J. (M. C.), 87; R. v. Cosser, 13 Cox, 187; R. v. Brownlow, 14 Cox, C. C. R. 216; R. v. Bredin, 15 Cox, 412; R. v. Portugal, 16 Q. B. D. 487; R. v. Berthiaume, 10 L. N. 365.

313. Husband and wife.—No husband shall be convicted of stealing, during cohabitation, the property of his wife, and no wife shall be convicted of stealing, during cohabitation, the property of her husband; but while they are living apart from each other either shall be guilty of theft if he or she fraudulently takes or converts anything which is, by law, the property of the other in a manner which, in any other person, would amount to theft.

2. Every one commits theft who, while a husband and wife are living together, knowingly—

(*a.*) assists either of them in dealing with anything which is the property of the other in a manner which would amount to theft if they were not married; or

(*b.*) receives from either of them anything, the property of the other, obtained from that other by such dealing as aforesaid.

"By the *present* law, a husband or wife cannot steal from his wife or her husband, even if they are living apart, although by *recent statutes* the wife is capable of possessing separate property. So long as cohabition continues this seems reasonable: but when married persons are separated and have separate property it seems to us to follow that the wrongful taking of it should be theft. This section is also framed so as to put an end to an unmeaning distinction by which it is a criminal offence in an adulterer to receive from his paramour the goods of her husband but no offence in any one else to receive such goods from the wife."—Eng. Commr's Rep.

The *recent statutes* above referred to by the English Commissioners, as having reference to the separate property of married women, are the Married Women's Property Act of 1870 and Amendments thereto made up to 1878, when the Royal Commissioners made their Report. Since that date an important change has been made, in England, in regard to married women, by the passing of the Married Women's Property Act of 1882 (45, 46 Vict. c. 78,) which almost abolished, as far as property is concerned, the legal distinction between married and unmarried women, by giving to a married woman the fullest powers of acquiring, holding, and disposing of property as her own separate property, and that, too, without the old formality of the intervention of a trustee by means of a deed of settlement, *ante* or *post* nuptial. The statute enacts, that. "Every woman whether married before or after this act shall have in her own name, against all persons whomsoever, including her husband, the same civil remedies and also, (subject as regards her husband to the proviso hereinafter contained), the same remedies and redress by way of criminal proceedings, for the protection of her own separate property, as if such property belonged to her as a *feme sole*: **** provided that no criminal proceeding shall be taken by any wife against her husband by virtue of this act, *while they are living together*, as to or concerning any property claimed by her," *etc*,

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PART XXV.

RECEIVING STOLEN GOODS.

314. Receiving property obtained by any indictable offence.—Every one is guilty of an indictable offence, and liable to fourteen years' imprisonment, who receives or retains in his possession any-

thing *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.

Under article 3 (*k*), "having in one's possession," includes not only having in one's own personal possession, but also knowingly—

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

(ii.) having in any place (whether belonging to or occupied by one's self or not) for the use or benefit of one's self or of any other person;

If there are two or more persons, any one or more of whom, with the knowledge and consent of the rest, have anything 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.*"

Article 627, *post*, provides that any accessory after the fact and any receiver of stolen property may be prosecuted *whether the principal offender or thief has or has not been prosecuted or convicted;* and that any number of receivers of different parts of property which has been stolen may be tried together.

Other provisions with regard to receivers, are contained in articles 715, 716, and 717, *post*, which are as follows:

"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." Art. 715.

"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." Art. 716.

"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 accused." Art. 717.

These articles 715, 716, and 717 are re-enactments of secs. 200, 203, and 204 R. S. C. c. 174; and provisions to the same effect are contained in the Imperial Statutes 24-25 Vict. c. 96, sec. 94, and 34-35 Vict. c. 112, (The Prevention of Crimes Act, 1871), sec. 19.

In a prosecution against a receiver of stolen goods, the thief is a competent witness to prove the stealing of the goods and indeed to prove the whole case (1) but, where the only evidence against the alleged receiver is that of the thief, the presiding judge will advise the jury to acquit. (2) The mere fact that the stolen goods were found upon the alleged receiver's premises on the day of the theft is not sufficient to confirm the evidence of the thief, so as to make it proper to convict. (3)

The confession of the thief (unless made in the presence of and assented to by the alleged receiver) is not evidence against the person charged with the receiving. (4)

It is competent to a person charged with receiving stolen property to disprove the guilt of the alleged thief. (5)

Where an indictment charged that a certain evil disposed person feloniously stole certain goods, and that C. D. and E. F. feloniously received them, knowing them to be stolen, it was held good against the receivers as for a substantive felony. (6)

The goods stolen must be proved to have been received by the defendant; and though there be proof of a criminal intent to receive and a knowledge of the goods being stolen, if the *exclusive* possession of them still remains with the thief, the alleged receiver cannot be legally convicted of receiving (7). But a person having *joint* possession with the thief may be convicted as a receiver. (8)

It has been held that a principal cannot be treated at the same time as a receiver: so that, where A. entered a bar where B. was barman, and,—after exchanging with B., signs of recognition,—A. took refreshments for which he put down, in payment, a two shilling piece, whereupon, in A's presence, B. took, from his master's money, eighteen shillings and six pence which he handed, as change, to A., who went off with it,—it was held that these circumstances did not warrant A's conviction for receiving, but that the facts should have been left to the jury as evidence that A. was a principal offender and an accomplice with B. in the theft. (9)

But, where a defendant, who receives the goods has merely rendered some aid in carrying them off, just after being stolen, he may still, be convicted of receiving; as where A. and B. broke into a warehouse and stole thereout a quantity of butter, which they carried along the street thirty yards, and then

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(1) R. v. Haslam, 1 Leach, 418.
(2) R. v. Robinson, 4 F. & F. 43.
(3) R. v. Pratt, 4 F. & F. 315.
(4) R. v. Cox, 1 F. & F. 90; R. v. Turner, 1 Mood. C.C. 347.
(5) Fost. 365.
(6) R v. Caspar, 2 Mood. C. C. 101; 9 C. & P. 289.
(7) R. v. Wiley 2 Den. 37; 20 L. J. (M. C.) 4.
(8) R. v. Smith, Dears, 494; 24 L. J. (M. C.) 135.
See, also, article 317, *post*.
(9) R. v. Coggins, 12 Cox, (C. C. R.), 517; R. v. Perkins, 2 Den. 459; 21 L. J. (M. C.) 152.

fetched C., who being apprised of the robbery, assisted in carrying the property away. (1)

Where A., knowing that goods had been stolen, directed B., his servant, to receive them into his premises, and B., in pursuance of that direction afterwards received them, in A's absence, B. also knowing that they had been stolen, they were held to be indictable jointly. (2)

Two or more persons may be indicted jointly for receiving stolen property, though each successively received at different times the whole of what was stolen; and it makes no difference whether the goods were received direct from the thief or from intermediate persons. (3)

The actual manual possession or touch of the goods is not necessary to the completion of the offence of receiving; it is sufficient if the goods are in the actual possession of a person over whom the defendant has a control, so that they would be forthcoming if the defendant ordered it. (4) [See article 317, *post*; and see also, the last clause of article 3 (*k*) above set out, *ante*.] And there may be a conviction for receiving against a person who,—though he personally never had manual possession of the goods,—was present aiding and abetting another receiver who obtained actual possession of them. (5)

Where three persons were charged with larceny, and two others as accessories, in separately receiving portions of the stolen goods, and the indictment contained also two other counts, each charging one of the alleged receivers separately with a substantive felony, in separately receiving a portion of the stolen goods, it was held that, though the principals were acquitted, the receivers might be convicted on the last two counts of the indictment. (6)

If a husband, knowing that his wife has stolen goods, receives them from her, he may be convicted of receiving. (7)

The fact of the defendant's knowledge of the goods being stolen or obtained by some indictable offence, when he received them, may be proved either directly, by the evidence of the principal offender, or it may be proved circumstantially by shewing, for instance, that the defendant bought them very much under their value, or denied that they were in his possession, or the like. (8)

And to show guilty knowledge other instances of receiving goods belonging to the prosecutor, from the same person, may be proved; (9) even though they be the subject of other indictments and antecedent to the receiving in question. (10)

Evidence that on former occasions portions of the commodity stolen had been missed by the prosecutor and that the defendants, the alleged thief and receiver, had after such occasions been found selling such a commodity, and that which was sold on the last of these occasions being identified as part of that missed by the prosecutor, was held admissible in proof of the guilty knowledge. (11)

Upon a trial for stealing and for receiving, it is legal, under article 716, to prove that there was found in the prisoner's possession other property stolen

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(1) R. v. King, 332; See R. v. McMakin, *Id.*; R. v. Dyer, 2 East, P. C. 767; R. v. Atwell, *Id.* 768.

(2) R. v. Parr, 2 M. & Rob. 346.

(3) R. v. Reardon, L. R., 1 C. C. R. 31; 35 L. J. (M. C.) 171.

(4) R. v. Smith, Dears, 494; 24 L. J. (M. C.) 135.

(5) R. v. Rogers, 37 L. J. (M. C.) 83; See article 317, *post*.

(6) R. v. Pulham, 9 C. & P. 280; R. v. Hayes, 2 M. & Rob, 156.

(7) R. v. McAthey, L. & C. 250; 32 L. J. (M. C.) 35; R. v. Woodward, L. & C. 122; 31 L. J. (M. C.) 91.

(8) 1 Hale, 619.

(9) R. v. Dunn, 1 Moo C. C. 146. See, also, article 716, above set out at p. 292, *ante*.

(10) R. v. Davis, 6 C. & P. 177. See, also, as to evidence of previous convictions for receiving, article 717, set out above at p. 292, *ante*.

(11) R. v. Nicholls, 1 F. & F. 51.

within the preceding period of twelve months although such other property is the subject of another indictment against him to be tried at the same term or sitting of the court; (1) but it has been held in England that, under the first paragraph of section 19 of the Prevention of Crimes Act, (which first paragraph is the same as our law as contained in article 716), it was not sufficient merely to prove that "other property stolen within the preceding twelve months" had *at sometime*, during the twelve months, been dealt with by the prisoner, but that it must be proved that such *other property* was found in the prisoner's possession at the time when he was found in possession of the property forming the subject matter of the indictment. (2) Therefore, where the prisoner was indicted for receiving stolen goods, and, to shew guilty knowledge, evidence was tendered to prove that, a short time previously, the prisoner had sold for *half its value*, and had otherwise disposed of, other property stolen within the preceding twelve months, *Held*, that the statute did not extend to such evidence, which therefore was inadmissible. (3)

A., a boy, stole from B., his master, an article, which, after being so stolen, was taken from A., in the presence of B.; after this it was, with B.'s consent delivered back to A., in order to leave him at liberty to sell it to C., to whom he, A., had been in the habit of selling similar articles stolen. A., upon thus receiving back the article, sold it accordingly, to C.; who, being indicted for receiving it, of an evil-disposed person, knowing it to be stolen, was convicted, and, notwithstanding objection made, was sentenced. (4) But it has been since held that this case is not law, and that a defendant is not liable to conviction, under such circumstances, inasmuch as the goods when received were not *stolen goods*. (5)

A. after stealing some goods sent them, by railway in a parcel addressed to B., C. an officer of the railway company, from information received, examined the parcel at the railway station of the place of destination, and stopped it before its delivery to B. It was called for by A., the thief, on the day of its arrival at the railway station and refused to him. Next day, a porter of the Company by C.'s direction, took the parcel to a house which A. had designated; and it was there received by B. *Held* that B. could not be convicted of receiving, as the goods had ceased to be stolen goods at the time when he received delivery of them from the railway porter sent by C. to deliver them. (6)

This is expressly declared to be the law, by article 318, *post*.

Athough article 3 (*v.*), *ante*, includes in the definition of *property* not only the property originally in a person's possession or control but "also any property into or for which the same has been converted or exchanged, and any thing acquired by such conversion or exchange, whether immediately or otherwise," it will, in cases where the stolen goods have been altered, or converted into something else, between the time of the theft and the receiving, be as well to draw the indictment so as to correspond with the fact. For instance, A. and B. were indicted, the one for stealing, the other for receiving six notes of £100 each; A. stole the notes, changed them into notes of £20, some of which £20 notes he gave to B: *Held* that B. could not be convicted; for he did not receive the £100 notes stolen, and alleged by the indictment to have been stolen; (7) but where A. was indicted for sheep-stealing, and B. was charged with receiving "twenty pounds of mutton part of the goods." *etc*, it was held good. (8)

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(1) R. v. Jones, 14 Cox, 3.
(2) R. v. Carter, 12 Q. B. D. 522; 53 L. J. (M. C.) 96.
(3) R. v. Drage, 14 Cox, 85.
(4) R. v. Lyons, C. & Mar. 217.
(5) R. v. Dolan, Dears, 463; 24 L. J. (M. C.) 59; R. v. Hancock, 14 Cox, C. C. R. 119.
(6) R. v. Schmidt, L. R. 1 C. C. R. 15; 35 L. J. (M. C.) 94; R. v. Villensky (1892) 2 Q. B. 597.
(7) R. v. Walkley, 4 C. & P. 132.
(8) R. v. Cowell, 3 East P. C. 617, 781.

Recent possession of stolen property is evidence either that the person in possession stole it, or that he received it knowing it to be stolen, according to the circumstances of the particular case. Where a prisoner was found in recent possession of stolen property, of which he could give no satisfactory account, and where, from the circumstances, it might reasonably be inferred that he was not the thief, it was held that there was evidence for the jury tha the received the property knowing it to have been stolen. (1) And where a woman was charged with stealing and also for receiving, and the evidence consisted of the fact of the stolen property having been found concealed on her person at ten o'clock in the morning after the night on which it was stolen, and of her having made two contradictory statements as to how she became in possession of it, and the jury acquitted her of larceny but convicted her of receiving, the evidence was held sufficient to sustain the conviction. (2)

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.

Article 4, *ante*, gives to the expressions "post-letter," and "post-letter bag," the meanings assigned to them by the Post Office Act, which meanings will be found on page 7, *ante*.

Article 624, *post*, provides that, in the case of any offence in relation to a post-letter or a post-letter bag or other mailable matter, chattel, money or valuable security sent by post, the property thereof may in the indictment be laid in the Postmaster-General.

See articles 627, 715, 716, and 717, and comments thereon, under article 314, at p. 292, *ante*.

The articles relating to punishments for *stealing* a post-letter, a post-letter bag, or for stealing any chattel, money, or valuable security therein, etc., are 326, 327, and 328.

316. Receiving property obtained by offence punishable summarily.—Every one who receives or retains in his possession anything, knowing the same to be unlawfully obtained, the stealing of which is punishable, on summary conviction, either for every offence, or for the first and second offence only, is guilty of an offence and liable, on summary conviction, for every first, second or subsequent offence of receiving, to the same punishment as if he were guilty of a first, second or subsequent offence of stealing the same. R.S.C., c. 164, s. 84.

317. When receiving is complete.—The act of receiving anything unlawfully obtained is complete as soon as the offender has, either exclusively or jointly with the thief or any other person, possession of or control over such thing, or aids in concealing or disposing of it.

See comments and cases on p. 293, *ante*.

(1) R. v. Langmead, L. & C. 427.
(2) R. v. McMahon, 13 Cox, (C.C.R. *Irish*), 275.

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.

See cases on p. 295, *ante.*

Article 836 provides that the court may, for the loss of any property, which a person may have suffered through any offence, award him a money compensation, in the shape of a judgment debt against the offender. This applies to theft, receiving, and malicious injuries to property, etc.

Article 837 provides, that wherever a prisoner has been convicted either summarily or otherwise, of theft, or receiving, etc., a person who has innocently bought and paid the prisoner for the property may be reimbursed out of any money found upon and belonging to the prisoner.

The first and second paragraphs of Article 838 provide that property stolen or criminally obtained may, at the trial of the offender, be ordered to be restored to the owner; and the two remaining paragraphs of that article further provide, as follows;

"If it appears, before any award or order is made, that any valuable security has been *bonâ fide* paid or discharged by any person liable to the payment thereof, or being a negotiable instrument, has been *bonâ fide* taken or received by transfer or delivery, by any person, for a just and valuable consideration, without any notice or without any reasonable cause to suspect that the same had, by any indictable offence, been stolen, or if 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.

"4. Nothing in this section contained shall apply to the case of any prosecution of any trustee, banker, merchant, attorney, factor, broker or other agent intrusted with the possession of goods or documents of title to goods, for any indictable offence under sections three hundred and twenty or three hundred and sixty three of this Act."

PART XXVI.

PUNISHMENT OF THEFT AND OFFENCES RESEMBLING THEFT COMMITTED BY PARTICULAR PERSONS IN RESPECT OF PARTICULAR THINGS IN PARTICULAR PLACES.

319. Clerks and Servants.—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 ;

(*c.*) being employed in the service of Her Majesty, or of the Government of Canada or the Government of any province of Canada, or of any *municipality*, steals anything in his possession *by virtue of his employment.* R.S.C., c. 164, ss. 51, 52, 53, 54 and 59.

For the definition of *municipality*, see article 3 (*p*), *ante*. p. 4. Clause (*a*) of Article 319 corresponds with sec. 67 of 24-25 Vict, c. 96.

It is not necessary that the goods stolen should be the property of the master, in order to punish the offender under this clause. The words are "*belonging to or in the possession of* the master.

With reference to clause (*b*), the thing alleged to be stolen by a cashier or other officer or employee of a bank, may be either, anything *belonging* to the bank or anything *lodged* or *deposited with* such bank.

In the case of a government employee or of an employee of any municipality, the theft must be of something in his possession *by virtue of his employment*, in order to be punishable under article 319, clause (*c*).

The main distinction between theft, by a clerk or other employee, and embezzlement seems to have been that, in order to be embezzled, the money, *etc.*, in question must not at the time of its misappropriation by the employee have reached the master's own possession ; because if it had once reached the master's possession, either *actually* or *constructively* the servant's offence would, at common law, have been larceny. (1)

For instance, where the defendant's duty was to place, every night, in his employers, safe, in an office where he conducted his employer's business, (though this office was in his own house), the monies received by him on their account and not used during the day, it was held, that, by placing the money there, the defendant determined his own exclusive possession of it and that by afterwards taking some of it out of the safe, *animos furandi*, he was guilty of larceny. (2)

On the other hand, where the clerk and head manager of an insurance company, having, in the course of their business, received from the managers of branch offices, several cheques payable to his own order, which it was his duty to endorse and hand over to the company's cashier, but which he endorsed and cashed, appropriating the proceeds to his own use, it was held to be embezzlement. (3)

This distinction was, for all practical purposes, rendered immaterial in prosecutions against clerks and servants, by the passing of special legislation, enacting, that, a defendant, indicted for embezzlement, might, if the facts adduced in evidence, disclosed a larceny, be convicted of the latter offence, and *vice versâ*. But, as we have already seen, the distinction is now swept away, entirely ; and *embezzlement*, is simply treated as one of a number of ways of committing *theft*. (See articles, 304, 305 and 310, *ante*, and comments thereunder). If the defendant cannot be shewn to be the clerk or servant of the prosecutor, he may, instead of being convicted, as such, under article 319, be convicted of the theft, without regard to any capacity in which he was acting

(1) R. v. Goodenough, Dears 210 ; R. v. Peck, 2 Russ. 180 ; R. v. Smith, R. & R. 267 ; R. v. Hawkins, 1 Den. 584.
(2) R. v. Wright, Dears & B 431 ; 27 L. J. (M. C.) 65.
(3) R. v. Gale, 2 Q. B. D. 141 ; 46 L. J. (M. C.), 134.

when he committed it, and according to the nature or description of the thing stolen, he may be punished under the particular article of the code applicable thereto; or, if it be something for which no punishment is otherwise provided, he will be punishable under artice 356, *post*.

It is provided, by article 626, *post*, that any number of distinct charges of theft, not exceeding three, alleged to have been committed within six months from the first to the last of such offences, may be tried at one and the same time

Although the distinction between theft and embezzlement has been completely removed, questions may still arise, in prosecutions for theft, as they formerly did in cases of embezzlement, as to whether the defendant is a clerk or servant or other employee, within the terms of, and punishable under, article 319. It has been held that the question of, whether the defendant is or is not a clerk or servant, is one of fact for the jury; (1) and there are, upon the question, many English cases, which will be in point, inasmuch as the English statute, upon which these cases have arisen, is, although it relates to embezzlement, to the same effect, as, and almost in the very language of clause (*a.*) of our article 319, in its reference to clerks and servants. The words of the English Act are "whosoever being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant." (2)

A female servant is within the meaning of the enactment. (3) And so is an apprentice, although under age. (4)

A son, who lives with his father and performs for him duties usually performed by a clerk, has been held to be "employed for the purpose or in the capacity of a clerk or servant," within the meaning of the law, although he received no salary, and although there was no contract binding him to go on doing these duties. (5)

A person who was employed as accountant and treasurer to overseers of the poor and whose duty it was to receive and pay out monies coming to and going out from such overseers, was held to be a clerk or servant, within the statute. (6)

A collector of poor and other rates, within the parish of St. Paul, Covent Garden, was held to be rightly described as servant to the committee of management of the affairs of the parish; although he was elected by the vestrymen of the parish; (7) and an assistant overseer elected by the parishioners who fix his duties and salary was held rightly described, as the servant of the inhabitants of the parish, in an indictment charging him with embezzling monies collected by him for the poor-rate. (8)

A clerk of a savings bank was held to be properly described as a clerk to the trustees, though elected by the managers. (9) Such a clerk is now covered, in common with all bank cashiers, managers, officers, clerks or servants, by the express terms of clause (*b.*) of the above article 319.

The mode by which the defendant is paid or receives remuneration for his services is immaterial. If he is a clerk or servant or *is employed for the purpose or in the capacity of a clerk or servant*, he is within the law.

A.,—who was employed as a master of a barge, to carry out and sell coals, and was allowed, as remuneration for his labor, a portion of the profits, after

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(1) R. v. Negus, L. R., 2 C.C.R. 34; 42 L. J. (M. C.) 62.
(2) 24 & 25 Vict, c. 96, sec. 68.
(3) R. v. Smith, R. & R. 267.
(4) R. v. Mellish R. & R. 80.
(5) R. v. Foulkes, L. R. 2 C.C.R. 150; 44 L. J. (M. C.) 65.
(6) R. v. Squire, R. & R. 349; R. v. Townsend, 1 Den. 167; 2 C. & K. 168; R. v. Adey, 1 Den. 578; 19 L. J. (M. C.) 149.
(7) R. v. Callahan, 8 C. & P. 154.
(8) R. v. Carpenter, L. R., 1 C.C.R., 29 : 35 L. J. (M. C.) 169.
(9) R v. Jenson, 1 Moo. C. C., 434.

deducting the price of the coals at the colliery,—took a quantity of coals, sold them, received the price, and absconded with the money. *Held* by a majority of the judges that he was a servant within the meaning of the English statute. (1)

A. was employed as a traveller by B., the prosecutor, to take orders and collect money; his remuneration being a percentage upon the orders he got; he paying his own expenses; he did this not only for B., but was employed by other persons also. *Held* that he was a clerk to B., within the meaning of the act. (2)

Where the cashier of a firm had, besides a salary, a percentage on the profits of the firm's business, but was not liable for the firm's losses, and had no control over the management of the business, it was held that he might be indicted, as a servant, for embezzling the firm's monies. (3)

The distinction to be drawn between a clerk or servant, and an agent, seems, according to the cases, to be this: for instance, a commercial traveller, whether paid by commission or salary, who is under orders to go here and there, or is bound to devote the whole or, at least, some portion of his time to the service of his employer, is a clerk or servant, or person employed for the purpose or in the capacity of a clerk or servant; but a person who is not under orders to go here and there, and who is not bound to devote any portion of his time to the service of his principal, but who may get business for his principals in consideration of a commission, or abstain from getting business for them, as he chooses, is not such a clerk or servant. Thus where A. was employed by B. to solicit orders and collect moneys, for which work he was paid by commission, he being at liberty to get orders when and where he pleased, but to be exclusively in the employ of B. and to give the whole of his time to B's service, he was held to be B's servant. (4) And A. would still have been B's servant if he was a traveller under orders to go here and there, even although he might have been at liberty to obtain orders for other persons besides B., and so was not bound to devote all his time to B's service. (5) But where A. was employed by B., and C., as their agent for the sale of coals on commission, and to collect monies in connexion with his orders, but was at liberty to dispose of his time as he thought best, and to get or abstain from getting orders as he might choose, he was held not to be a clerk or servant within the statute. (6)

The test whether a person is a clerk or servant of his alleged master is—Was he under the control of and bound to obey his alleged master? And where A. was employed to sclicit orders for B. and was to be paid a commission on the sums received through his means, and he was at liberty to apply for orders whenever he thought most convenient, but was not to employ himself for any other persons than B., it was held that these facts did not shew him to be a clerk or servant. (7)

The distinction between this last case and R. v. Bailey, (*supra*), is that in R. v. Bailey the prisoner was under the prosecutor's control, having to devote *his whole time* to the service, while, in R. v. Negus, although the prisoner was not to employ himself for any other persons than the prosecutor, he might go away to amuse himself whenever he liked. (8).

A. and B. employed C., who carried on an independent business as an accountant and debt collector, to collect certain debts for them at a commission on the amount received, the time and mode of collecting the debts being in C's

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(1) R. v. Hartley, R. & R. 139.

(2) R. v. Carr, R. & R. 198; R. v. Hoggins, R. & R. 145; R. v. Tite, L. & C. 29; 30 L. J. (M. C.) 142. See also, R. v. Turner, 11 Cox, 551.

(3) R. v. Macdonald, L. & C. 85; 31 L. J. (M. C.) 67.

(4) R. v Bailey, 12 Cox, C. C. R. 56.

(5) R v. Tite, *supra*.

(6) R. v. Bowers, L. R., 1 C. C. R. 41; 35 L. J. (M. C.) 206; R. v. Maybe, 11 Cox, 150; R. v. Marshall, 11 Cox, 490.

(7) R. v. Negus, L. R., 2 C. C. R. 34; 42 L. J. (M. C.) 62.

(8) See Rem. of *Bovill.* C. J., and *Blackburn*, J., L. R, (C. C. R.) 35.

discretion, and it being *his duty to pay over the amounts received by him* to A. and B., *as soon as he had received them*. *Held*, that C. was not employed in the capacity of a clerk or servant to A. and B (1) In view of the fact that C. was bound to pay over the amounts collected as soon as he received them, it seems likely that if he failed to do so and converted them to his own use or omitted to properly account for them, he might, now, be held criminally liable, under article 308, *ante*, or under article 310, *ante*, if that part of the transaction, which made it his duty to pay over the collections as soon as received, were in the shape of a direction in writing.

The employment need not be permanent, A. agreed to let B., (when he had nothing else to do), carry out parcels, for which work B. was to be paid whatever A. pleased. During the course of this employment, A. gave B. an order to receive £2, which B. collected and converted to his own use. B. was held to be a servant within the meaning of the act: (2) and where a drover who was employed to drive two cows to a purchaser and receive the purchase price, embezzled, he was held to be a servant (3).

A., a member of, and secretary to, a society fraudulently withheld money received by him from a member to be paid to the trustees of the society, and, when prosecuted for embezzlement, was held properly described as the clerk and servant of the trustees, although the money ought in the ordinary course to have been received by the steward, and although the articles of the society were not enrolled, and the society, was not conducted strictly according to the act of parliament. (4) But a mere unpaid treasurer of a friendly society, not appointed by the trustees of the society is not a clerk or servant of the trustees, in whom the monies of the society are vested. (5) In Tyree's case, Bovill, C J., said, "The trustees have all the monies of the society vested in them, by statute, as well as by one of their rules, and the prisoner must account to them; but this does not make him their servant. The treasurer is an accountable officer, but not a servant." And previously to the 31 & 32 Vict. c. 116, (which made a co-partner or co-owner indictable for stealing partnership or joint property), the secretary, (also a member) of a friendly society established under the 18 & 19 Vict c. 63, for which no trustees had been appointed could not be convicted on an indictment for embezzling the society's monies, the property in the monies being laid in A. B. (one of the members of the society), and others, (the rest of the members) and the prisoner being described as the servant of A. B. and the others; because the "others" would have comprised himself, and the indictment would thus have charged him, as his own servant, with embezzling his own money. (6)

It has been held that, in England, a person cannot be convicted as clerk or servant to a society which, by reason of administering an unlawful oath to its members, is an unlawful combination and confederacy. (7)

A society in the nature of a friendly society, (although not enrolled or certified under the Friendly Societies Act), some of whose rules are in restraint of trade, and therefore void, is not an illegal society in the sense of being disabled from prosecuting a servant for stealing its funds. (8)

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(1) R. v. Hall, 13 Cox, 49.
(2) R. v. Spencer, R. & R. 299; R. v. Smith, R. & R. 516.
(3) R. v. Hughes, 1 Moo. C. C. 370.
(4) R. v. Hall, 1 Moo. C.C., 474; R. v. Miller, 2 Moo. C. C. 249; R. v. Proud, L. & C 97; 31 L. J. (M. C.) 71.
(5) R. v. Tyree, L. R. 1 C. C. R. 177; 38 L. J. (M. C.) 58; See article 311, *ante*, as to theft by partners and co-owners
(6) R. v. Diprose, 11 Cox, 185; R. v. Taffs, 4 Cox, 169; R. v. Bren, L. & C. 346; 33 L. J. (M. C.) 59.
(7) R. v. Hunt, 8 C. & P. 642. See, as to unlawful oaths, etc, articles 120, 121 and 122 and remarks thereon, *ante* pp. 64, 65 and 66.
(8) R. v. Stainer L. R., 1 C. C. R. 230; 39 L. J. (M. C.) 54.

The usual presumptive evidence of the misappropriation, by a clerk, of money, etc., received by him on his employer's account is that he has never accounted to his master for the money, etc., so received by him, or that he denied having received it. Where it was the servant's duty to account for and pay over at stated times, the money received by him, his not doing so wilfully was held to be an embezzlement; (1) and would now be theft. And even where no precise time could be fixed at which it was the defendant's duty to pay the moneys over, his not accounting for them, if found by the jury to have been done fraudulently, was held to be equally an embezzlement. (2)

"It is not sufficient to prove a general deficiency in account. Some specific sum must be proved to be embezzled, in like manner as, in larceny, some particular article must be proved to have been stolen." (3)

With reference to prosecutions against, government and municipality employees under articles 319 (*c.*), and 321 the property in the thing in question may be laid in Her Majesty or the municipality, as the case may be. (See Article 623, *post.*)

320. Agents and attorneys.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who steals anything by any act or omission amounting to theft under the provisions of sections three hundred and eight, three hundred and nine and three hundred and ten.

See *ante*, pp. 287, and 288 *ante*.

321. Public servants refusing to deliver up chattels books, &c. lawfully demanded.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, being employed in the service of Her Majesty or of the Government of Canada or the Government of any province of Canada, or of any municipality, and intrusted by virtue of such employment with the keeping, receipt, custody, management or control of any chattel, money, valuable security, book, paper, account or document, refuses or fails to deliver up the same to any one authorized to demand it. R.S.C., c. 164, s. 55.

See article 3 (*cc*) *ante* for definition of "Valuable Security."

322. Tenants and lodgers.—Every one who steals any chattel or fixture let to be used by him or her in or with any house or lodging is guilty of an indictable offence and liable to two years' imprisonment, and if the value of such chattel or fixture exceeds the sum of twenty-five dollars to four years' imprisonment. R.S.C., c. 164, s. 57.

The indictment for an offence against this section may be in the same form as if the offender were not a tenant or lodger. (See article 625, *post.*) As to wilful injuries to houses, *etc.*, by tenants, &c. See article 504, *post.*

323. Testamentary instruments.—Every one is guilty of an indictable offence and liable to imprisonment for life who, either during the life of the testator or after his death, steals the whole or any part

(1) R. v. Jackson, 1 C. & K. 384.
(2) R. v. Welch, 1 Den. 199; 2 C. & K. 296; R. v. Wortley, 2 Den. 333; 21 L. J. (M. C.) 44.
(3) Rem. of Alderson, B., in R. v. Lloyd Jones, 8 C. & P. 288. See, also, R. v. Chapman, 1 C. & K. 119; R. v. Wolstenholme, 11 Cox, 313.

of a *testamentary instrument*, whether the same relates to real or personal property, or to both. R.S.C., c. 164, s. 14.

A "testamentary instrument" includes will, codicil, or other testamentary writing or appointment, as well during the life of the testator whose testamentary disposition it purports to be as after his death, whether the same relates to real or personal property, or both. (See article 3 (*aa*), (*ante*.)

324. Documents of title to lands or goods.—Every one is guilty of an indictable offence and liable to three years' imprisonment who steals the whole or any part of any *document of title to lands or goods*. R.S.C., c. 164, s. 13.

The expression "*document of title to goods*" includes any bill of lading, India warrant, dock warrant, warehouse-keeper's certificate, warrant or order for the delivery or transfer of any goods or valuable thing, bought and sold note or any other document used in the ordinary course of business as proof of the possession or control of goods, authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of such document to transfer or receive any goods thereby represented or therein mentioned or referred to. (Art. 3 (*g*), (*ante*.)

The expression "*document of title to lands*" includes any deed, map, paper or parchment, written or printed, or partly written and partly printed, being or containing evidence of the title, or any part of the title, to any real property, or to any interest in any real property, or any notarial or registrar's copy thereof, or any duplicate instrument, memorial, certificate or document authorized or required by any law in force in any part of Canada respecting registration of titles and relating to such title. (Art. 3 (*h*), (*ante*.)

The above definition of "document of title to goods" is exactly the same as is contained in the Imperial statute, 24–25 Vict., c. 96, sec. 1.

325. Judicial or official documents, etc.—Every one is guilty of an indictable offence and liable to three years' imprisonment who steals the whole or any part of any record, writ, return, affirmation, recognizance, *cognovit actionem*, bill, petition, answer, decree, panel, process, interrogatory, deposition, affidavit, rule, order or warrant of attorney, or of any original document whatsoever of or belonging to any court of justice, or relating to any cause or matter begun, depending or terminated in any such court, or of any original document in any wise relating to the business of any office or employment under Her Majesty, and being or remaining in any office appertaining to any court of justice, or in any government or public office. R.S. C., c. 164, s. 15.

See article 353, *post*, by which the same punishment is awarded, for fraudulently destroying, cancelling concealing or obliterating any document of title or any valuable security, testamentary instrument or judicial, official, or other document, as for stealing any of them.

326. Stealing post letter bags, etc.—Every one is guilty of an indictable offence and liable to imprisonment for life, or for any term not less than three years, who steals—

(*a*.) a post letter bag; or

(*b*.) a post letter from a post letter bag, or from any post office, or from any officer or person employed in any business of the post office of Canada, or from a mail; or

(*c.*) a post letter containing any chattel, money or valuable security; or

(*d.*) any chattel, money or valuable security from or out of a post letter. R.S.C., c. 35, ss. 79, 80 and 81.

327. Every one is guilty of an indictable offence and liable to imprisonment for any term not exceeding seven years, and not less than three years, who steals—

(*a.*) any post letter, except as mentioned in paragraph (*b*) of section three hundred and twenty-six;

(*b.*) any parcel sent by parcel post, or any article contained in any such parcel; or

(*c.*) any key suited to any lock adopted for use by the Post Office Department, and in use on any Canada mail or mail bag. R.S.C., c. 35, ss. 79, 83 and 88.

328. Every one is guilty of an indictable offence and liable to five years' imprisonment who steals any printed vote or proceeding, newspaper, printed paper or book, packet or package of patterns or samples of merchandise or goods, or of seeds, cuttings, bulbs, roots, scions or grafts, or any post card or other mailable matter (not being a post letter) sent by mail. R.S.C., c. 35, s. 90.

See article 4, *ante*, p. 7 for the definitions of post letter *etc.*

See article 624, as to how the ownership of articles stolen is to be laid in the indictment, *etc.*

Sec. 89, (which is unrepealed), of the R.S.C. chap. 35, has the following provision against opening post letters &c;—

"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 theron, 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."

An offence against this section will be punishable, under article 951, *post*, by five years' imprisonment; seeing that chap. 181, R.S.C.,—relating to punishments,—is repealed.

The taking away and destroying of a post letter in order to suppress inquiries, supposed, by the defendant, to be made, in it, about her character, was held to be a larceny of the letter. (1)

Taking the mail-bags off the horse during the momentary absence of the person employed to carry them was held to be a taking from his possession. (2)

A., with intent to deprive B.,—to whom a letter is addressed,—of such letter,

(1) R. v. Jones, 1 Den. 188; 2 C. & K. 236.
(2) R. v. Robinson, 2 Stark, N. P. 485.

and to commit a fraud, induced C., a post-office employee, to intercept and hand over such letter while in course of transmission by post. *Held*, that A. and C. were both guilty of larceny of the letter. (1)

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.

Persons wilfully destroying, injuring, obliterating or making erasures, etc., in election documents, are punishable, under article 503, with seven years' imprisonment.

330. Stealing railway or steamboat tickets.—Every one is guilty of an indictable offence and liable to two years' imprisonment who steals any tramway, railway or steamboat ticket or any order or receipt for a passage on any railway or in any steamboat or other vessel. R.S.C., c. 164, s. 16.

In an American case, it was held, (under a statute of the State of Minnesota, making it larceny to steal railroad passenger tickets), that a conductor may be indicted for appropriating tickets, sold and issued by a railroad company, and taken up by the conductor, such tickets, after being thus taken up being the property of the company. (2)

331. Cattle.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who steals any cattle. R.S.C., c. 164, ss. 7 and 8.

This article refers to live cattle. The stealing of a dead cow or of any part of it would be punishable under article 356, *post*.

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 familar name known, and shall apply to *one* animal as well as to *many*. (Art. 3 (*d*), (*ante*.).

Article 499 (B), *post*, inflicts the same punishment of fourteen years' imprisonment for wilfully destroying or damaging any cattle.

A person who kills a horse, or any other animal included in the above definition of cattle, with intent to steal its carcase or skin, *etc.*, is by the terms of article 307, guilty of stealing it, and liable to fourteen years' imprisonment, under the above article, 331.

Attempts and written threats to kill or injure cattle are punishable, under articles 500 and 502 by two year's imprisonment.

A. removed sheep from the fold into the open field, killed them and took away

(1) R. v. James, 24 Q. B. D. 439; 59 L. J. (M. C.) 96.
(2) State v. Brin, 30 Minn. 522; Rapalge Larc., s. 44.

the skins. *Held* that the removing of the sheep from the fold was sufficient to constitute larceny. (1)

An indictment for stealing live animals need not state them to be alive, for the law will presume them to be so, unless the contrary be stated. If, when stolen the animal was dead, the fact should be stated ; (2) unless it be an animal which has the same appellation whether it be alive or dead, in which case it need not be stated to be dead. (3)

332. Stealing dogs, birds, beasts, etc.—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 property stolen, or to one month's imprisonment with hard labour, 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.*

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. 9.

See article 501, *post*, as to the punishment for wilfully killing' maiming or injuring any such dog, bird, beast or other animal.

A person who kills any such dog, or any bird, *etc.*, with intent to steal the carcase, skin, plumage or other part thereof, is, by the terms of article 307, *ante*, guilty of stealing it ; and will therefore be punishable under the above article, 332.

333. Pigeons.—Every one who unlawfully and wilfully kills, wounds or takes any house-dove or pigeon, under such circumstances as do not amount to theft, is guilty of an offence and liable, upon complaint of the owner thereof, on summary conviction, to a penalty not exceeding ten dollars over and above the value of the bird. R.S.C., c. 164, s. 10.

See remarks of English Commrs., at p. 268, *ante.*

See also the first clause of article 304, *ante*, under which tame pigeons, while in a dovecote, or on their owner's land are capable of being stolen. The punishment would be under article 332, *ante*, article 501 *post*, provides for the punishment of injuries to birds, *etc.*

334. Oysters.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who steals oysters or oyster brood.

2. Every one is guilty of an indictable offence and liable to three months' imprisonment who unlawfully and willfully uses any dredge or net, instrument or engine whatsoever, within the limits of any oyster bed, laying or fishery, being the property of any other person, and sufficiently marked out or known as such, for the purpose of taking oysters or oyster brood, although none are actually taken, or unlawfully and willfully with any net, instrument or engine, drags upon the ground of any such fishery.

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(1) R. v. Rawlins, 2 East, P. C. 617.

(2) R. v. Edwards, R. & R. 497; R. v. Halloway, 1 C. & P. 128; R. v. Williams, 1 Moo. C. C. 107.

(3) R. v. Puckering, 1 Moo. C. C. 242.

3. Nothing herein applies to any person fishing for or catching any swimming fish within the limits of any oyster fishery with any net, instruments or engine adapted for taking swimming fish only. R.S.C., c. 164, s. 11.

Article 619 (*e*), *post*, provides that for an offence under the above section it shall be sufficient if the indictment describes the oyster bed, *etc.*, by name or otherwise, without stating it to be in any particular county or place.

335. Things fixed to buildings or land.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who steals any glass or woodwork belonging to *any building whatsoever*, or any lead, iron, copper, brass or other metal, or any utensil or fixture, whether made of metal or other material, or of both, respectively fixed in or to *any building whatsoever*, or any thing made of metal fixed in *any land*, being private property, or for a fence to any dwelling-house, garden or area, or in any *square or street*, or in *any place dedicated to public use or ornament*, or in *any burial ground*. R.S.C., c. 164, s. 17.

See the English Commrs' remarks at p. 268, *ante*, and also section 303, *ante*.

An unfinished building intended as a cart-shed, boarded up on all sides, and with a door with a lock on it, and the frame of a roof with loose gorse thrown upon it, it not being yet thatched, was held under the English Statute on this subject to be a building. (1)

An indictment for stealing lead fixed to *a certain wharf* was held to be sufficient, the wharf being proved to be in fact a building. (2)

It was held that a church yard was a place dedicated to public use, and that it was larceny to take away brass affixed to a tomb stone in the church yard; although, at that time, the words "or in any burial ground" were not in the Englih Statute; (3) and it has been held that the stealing of a copper sun-dial fixed on the top of a wooden post in a church yard was within the statute. (4)

336. Stealing trees, etc.—Every one is guilty of an indictable offence and liable to two years' imprisonment who steals the whole or any part of any tree, sapling or shrub, or any underwood, the thing stolen being of the value of *twenty-five* dollars, or of the value of *five dollars* if the thing stolen grows in any *park, pleasure ground, garden, orchard or avenue*, or in any *ground adjoining or belonging to any dwellinghouse*. R.S.C., c. 164, s. 18.

337. Every one who steals the whole or any part of any tree, sapling or shrub, or any underwood, the value of the article stolen, or the amount of the damage done, being twenty-five cents at the least, is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty-five dollars over and above the value of the article stolen or the amount of the injury done.

2. Every one who, having been convicted of any such offence,

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(1) R. v. Worrall, 7 C. & P. 516.
(2) R. v. Rice, Bell, 87; 28 L. J. (M. C.) 64.
(3) R. v. Blick, 4 C. & P. 377.
(4) R. v. Jones, Dears, & B. 555; 27 L. J. (M. C.) 171.

afterwards commits any such offence is liable, on summary conviction, to *three months'* imprisonment with hard labour.

3. Every one who, having been twice convicted of any such offence, afterwards commits any such offence is guilty of an indictable offence and liable to *five years'* imprisonment. R.S.C., c. 164, s. 19.

The words " adjoining any dwelling-house " have been held to import *actual contact* ; and that therefore ground separated from a house by a narrow walk, and paling, wall, or gate, was not within their meaning. (1)

The injury must be the actual injury to the tree itself, and does not include *consequential* damage ; and where the evidence that the actual injury done to certain trees by the defendant was less than the statutable amount but that the injury done would necessitate the stubbing up and replacing part of an old hedge at an expense greater than the statutable amount, it was nevertheless held insufficient. (2)

As to wilful destruction of or damage to trees, vegetables plants, etc., see articles 508, 509, and 510, *post*.

338. Timber Found Adrift.—Every one is guilty of an indictable offence and liable to three years' imprisonment who—

(*a.*) without the consent of the owner thereof:

(i.) fraudulently takes, holds, keeps in his possession, collects, conceals, receives, appropriates, purchases, sells or causes or procures or assists to be taken possession of, collected, concealed, received, appropriated, purchased or sold, any timber, mast, spar, saw-log or other description of lumber which is found adrift in, or cast ashore on the bank or beach of, any river, stream or lake ;

(ii.) wholly or partially defaces or adds or causes or procures to be defaced or added, any mark or number on any such timber, mast, spar, saw-log or other description of lumber, or makes or causes or procures to be made any false or counterfeit mark on any such timber, mast, spar, saw-log or other description of lumber ; or

(*b.*) refuses to deliver up to the proper owner thereof, or to the person in charge thereof, on behalf of such owner, or authorized by such owner to receive the same, any such timber, mast, spar, saw-log or other description of lumber. R.S.C., c. 164, s. 87.

See Article 708, *post*, as to evidence of ownership etc.

339. Stealing fences stiles and gates.—Every one who steals any part of any live or dead fence, or any wooden post, pale, wire or rail set up or used as a fence, or any stile or gate, or any part thereof respectively, is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty dollars over and above the value of the article or articles so stolen or the amount of the injury done.

2. Every one who, having been convicted of any such offence, afterwards commits any such offence is liable, on summary conviction, to three months, imprisonment with hard labour. R.S.C., c. 164, s. 21.

(1) R. v. Hodges, M. & M. 341.
(2) R. v. Whiteman Dears, 353 ; 23 L. J. (M. C.) 120.

340. Failing to satisfy justice that possession of tree &c. is lawful.—Every one who, having in his possession, or on his premises with his knowledge, the whole or any part of any tree, sapling or shrub, or any underwood, or any part of any live or dead fence, or any post, pale, wire, rail, stile or gate, or any part thereof, of the value of twenty-five cents at the least, is taken or summoned before a justice of the peace, and does not satisfy such justice that he came lawfully by the same, is guilty of an offence and liable, on summary conviction, to a penalty not exceeding ten dollars, over and above the value of the article so in his possession or on his premises. R.S.C., c. 164, s. 22.

341. Stealing roots plants, &c.—Every one who steals any plant, root, fruit or vegetable production growing in any garden, orchard, pleasure ground, nursery ground, hot-house, 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 month's imprisonment with or without hard labour.

2. Every one who, having been convicted of any such offence, afterwards commits any such offence is guilty of an indictable offence and liable to three years' imprisonment. R.S.C., c. 164, s. 23.

342. Every one who steals any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture, and growing in any land, open or inclosed, not being a garden, orchard, pleasure ground, or nursery ground, is guilty of an offence and liable, on summary 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 eommits any such offence is liable to three months' imprisonment with hard labour. R.S.C., c. 164, s. 24.

343. Stealing ores of metals.—Every one is guilty of an indictable offence and liable to two years' imprisonment who steals the ore of any metal, or any quartz, lapis calaminaris manganese, or mundic, or any piece of gold, silver or other metal, or any wad, black cawk, or black lead, or any coal, or cannel coal, or any marble, stone or other mineral, *from any mine*, bed or vein thereof respectively.

2. It is not an offence to take, for the purposes of exploration or scientific investigation, any specimen or specimens of any ore or mineral from any piece of ground uninclosed and not occupied or worked as a mine, quarry or digging. R.S.C., c. 164, s. 25.

Article 312, *ante*, has reference to fraudulently concealing from a partner in a mining claim any gold or silver taken from such claim; and article 354 provides the punishment for any such concealment.

See article 571, *post*, with reference to warrants to search unlawfully deposited gold or silver which has been mined, etc.

344. Stealing from the person.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who steals any chattel, money or *valuable security* from the person of another. R.S.C., c. 164, s. 32.

To constitute this offence, the thing must be taken either from the person of the prosecutor, or in his presence. (1) The taking from the person distinguishes this offence from simple theft; and it differs from robbery in the fact that, although the taking is from the person, it is not accompanied with violence or so done as to put the owner or possessor of the thing in fear.

If the goods have not been completely severed from the person of the prosecutor or completely taken into the physical possession of the offender, it seems that it will not be sufficient to constitute this offence, although the moving of the thing may, under the terms of sub-section 4 of article 305, *ante*, be sufficient to constitute simple theft.

Where A. drew a book from the inside of B's coat pocket about an inch above the top of the pocket, but, whilst the book was still about B's person, B. suddenly put up his hand, when A. let go his hold and the book dropped back into the pocket. *Held* not to constitute stealing from the person, but it was held to be a simple larceny. (2)

A's watch, (which he carried in his vest pocket), was fastened to a chain, the other end of which was passed through a button-hole of the vest and kept there by a watch-key. B. took the watch out of A's vest pocket and forcibly drew the attached chain and key out of the button-hole, but the key, after passing clear of the button-hole, caught upon a button on another part of the vest, and A's hand being, at that moment, seized, the watch and chain fell from his hand and remained there, suspended to the button on which it caught. *Held*, to be such a severance as amounted to stealing from the person; (3) and where the defendant snatched at a lady's ear-ring, and succeeded in separating it from the ear and it was afterwards found among the curls of her hair, it was held to be a severance. (4)

Where a man went to bed with a prostitute, and she, while he was asleep, stole the watch, which he had left in his hat on the table, it was held to be a stealing in a dwelling-house, and not a stealing from the person. (5)

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.

The things stolen must be under the protection of the house, and in order to bring the offence within the operation of clause (*a*) they must be of the value of $25; or, if they are of less than that value, they must be stolen by some menace or threat putting some one in the house in bodily fear, in which case it will come within clause (*b*).

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(1) R. v. Francis, 2 Str. 1015; R. v. Grey, 2 East, P. C. 708; R. v. Hamilton, 8 C. & P. 49.
(2) R. v. Thompson, 1 Mood. 78.
(3) R. v. Simpson, Dears. 621; 24 L. J. (M. C.) 7.
(4) R. v. Lapier, 1 Leach, 320.
(5) R. v. Hamilton, 8 C. & P. 49.

Where a person in his own dwelling-house stole from another person goods of the value of £5, it was held to constitute, under the English statute: the offence of stealing in a dwelling-house. (1)

A. a lodger, invited B. an acquaintance, to sleep at his lodgings, (without the knowledge of C., the landlord of the house, and during the night, A. stole B.'s watch from the bed's head. *Held*, that A. was properly convicted of stealing in the dwelling-house. (2)

If, although the stealing take place in a house, the *thing be* under the protection of the *person* of the prosecutor, at the time it is stolen, the offence will not, in that case, come within the *meaning* of the article; as, for instance, where the defendant procured money to be given to him for a particular purpose and then ran away with it; (3) or, where the prosecutor, by means of the *ring dropping* trick, was induced to lay down his money upon a table, and the defendant took up the money and went out of the house and carried it away. (4)

Goods left at a house for a person supposed to reside there will be under the protection of the house and the stealing of them will be within the above article, if their value amounts to $25 or, if the goods, not being of that value, are taken by menacing or threatening and putting some one in the house in bodily fear.

Two boxes belonging to A., who resided at No. 38, Rupert Street, were delivered by A., a porter, (whether by mistake or design did not appear) at No. 33 in the same street; B. the occupier of the latter house, imagining that the boxes were for C., who lodged there, delivered them to him; C. converted the contents of the boxes to his own use and absconded. *Held*, that the goods were within the protection of the house, and that C. was rightly convicted of stealing in a dwelling-house. (5)

If one, on going to bed, put his clothes and money by his bedside, they are under the protection of the dwelling house. and not of the person. (6) 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. (7)

It seems clear that, under the express words of clause (*b*), there must be bodily fear created by an actual menace or threat, in order to bring the offence within that clause.

Upon an indictment for stealing yarn in the process of bleaching it was proved that some time before the stealing, the yarn had been spread out upon the ground, but had been afterwards taken up from where it was spread out, and thrown into heaps, in order to be carried into the house and that, it was while it was thus in heaps, that the prisoner stole it. *Held*, that the case did not come within the statute so as to make the defendant guilty of stealing the yarn while in the process of bleaching, as it appeared there was no occasion, as part of the process to leave the yarn on the ground in the state in which it was when taken by the defendant. (8)

It has been held that goods remain in a "stage, process, or progress of manufacture," though the texture be complete, if they be not yet brought into a condition for sale.

If the theft be proved, but not the circumstances necessary to bring the case within this article the defendant may be found guilty of the simple theft.

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(1) R. v. Bowden, 2 Mood. C. C. 285; 1 C. & K. 147.
(2) R. v. Taylor, R. & R. 418.
(3) R. v. Campbell, 2 Leach, 264.
(4) R. v. Owen, 2 Leach, 572.
(5) R. v. Carroll, 1 Moo. C. C. 89.
(6) R. v. Thomas, Car. Sup. 295.
(7) Id.
(8) R. v. Hughill, 2 Russ. 225. R. v. Woodhead, 1 M. & Rob. 549.

346. Stealing by picklocks, etc.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, by means of any picklock, false key or other instrument steals anything from any receptacle for property locked or otherwise secured.

347. Stealing manufactures, etc.—Every one is guilty of an indictable offence and liable to five years' imprisonment who steals, to the value of two dollars, any woollen, linen, hempen or cotton yarn, or any goods or articles of silk, woollen, linen, cotton, alpaca or mohair, or of any one or more of such materials, mixed with each other or mixed with any other material, while laid, placed or exposed, during any stage, process or progress of manufacture, in any building, field or other place. R.S.C., c. 164, s. 47.

348. Fraudulently disposing of goods entrusted for manufacture.—Every one is guilty of an indictable offence and liable to two years' imprisonment, when the offence is not within the next preceding section, who, having been intrusted with, for the purpose of manufacture or for a special purpose connected with manufacture, or employed to make, any felt or hat, or to prepare or work up any woollen, linen, fustian, cotton, iron, leather, fur, hemp, flax or silk, or any such materials mixed with one another, or having been so intrusted, as aforesaid, with any other article, materials, fabric or thing, or with any tools or apparatus for manufacturing the same, fraudulently disposes of the same or any part thereof. R.S.C., c. 164, s. 48.

349. Stealing from ships, wharves, &c.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who—

(*a.*) steals any *goods* or *merchandise* in any vessel, barge or boat of any description whatsoever, in any haven or in any port of entry or discharge, or upon any navigable river or canal, or in any creek or basin belonging to or communicating with any such haven, port, river or canal; or

(*b.*) steals any *goods* or *merchandise* from any *dock*, *wharf or quay* adjacent to any such haven, port, river, canal, creek or basin. R.S.C., c. 164, s. 49.

This article is to the same effect as section 63 of 24-25 Vic., c. 96,

It appears that the "goods" or "merchandise" mentioned in this article mean such goods and merchandise as are usually lodged in vessels or on wharves or quays. (1) The luggage of a passenger going by steamboat is within the enactment. (2)

The words of the article are "*in* any vessel," etc.; and, therefore, in order to bring an offender within its terms, it will be immaterial whether or not the defendant has succeeded in getting the goods away from the ship, if there has been a sufficient asportation to constitute theft; but, in order to bring a case within clause (*b*) of the article, it will be necessary to prove more than a simple

(1) R. v. Grimes, Fost. 79 *n*; R. v. Leigh, 1 Leach, 52.
(2) R. v. Wright, 7 C. & P. 159.

theft; for the words there are "*from* any dock," etc., to satisfy which there must be an actual removal of the thing from the dock, etc., in the same manner as in the case of an indictment for stealing from the person. (l)

350. Stealing wreck.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who steals any wreck, R.S.C., c. 81; s. 36 (*c*).

See article 3 (*dd*), *ante*, for the definition of "wreck."

351. Stealing on railways.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who steals anything *in or from* any railway station or building, or from any engine, tender or vehicle of any kind on any railway.

If the whole offence be not proved, the jury may, if the evidence warrants it, bring in a verdict of guilty of an attempt. (See article 711, *post*).

352. Stealing things deposited in Indian graves.—Every one who steals, or unlawfully injures or removes, any image, bones, article or thing deposited in or near any Indian grave is guilty of an offence and liable, on summary conviction, for a first offence to a penalty not exceeding one hundred dollars or to three months' imprisonment, and for a subsequent offence to the same penalty and to six months' imprisonment with hard labour. R.S.C., c. 164, s. 98.

353. Destroying documents.—Every one who destroys, cancels, conceals or obliterates any document of title to goods or lands, or any *valuable security*, *testamentary instrument*, or *judicial*, *official* or *other* document, for any fraudulent purpose, is guilty of an indictable offence and liable to the same punishment as if he had stolen such document, security or instrument. R.S.C., c. 164, s. 12.

See article 3 (*g*), (*h*), (*aa*), and (*cc*), for definitions of "document of title to goods," "document of title to lands," "testamentary instrument," and "valuable security."

The *stealing* of testamentary instruments is punishable under article 323, of documents of title to land or goods, by article 324, and of judicial or official documents under article 325, *ante*.

354. Fraudulent concealment of property.—Every one is guilty of an indictable offence and liable to two years' imprisonment who, for any fraudulent purpose, takes, obtains, removes or conceals anything capable of being stolen.

355. Bringing stolen property into Canada.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who, having obtained elsewhere than in Canada any property by any act which if done in Canada would have amounted to theft, brings such property into or has the same in Canada. R.S.C., c. 164, s. 88.

This article is to the same effect as section 269 of the English Draft Code. For definition of "property" see article 3 (*v*), *ante*.

(l) Arch. Cr. Pl. & Ev. 471.

See article 314, *ante* as to *receiving* in Canada goods stolen or obtained out of Canada, by any indictable offence.

356. Stealing things not otherwise provided for.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who steals anything for the stealing of which no punishment is otherwise provided or commits in respect thereof any offence for which he is liable to the same punishment as if he had stolen the same.

2. The offender is liable to ten years' imprisonment if he has been previously convicted of theft. R.S.C., c. 164, ss. 5, 6 and 85.

See article 628, *post*, as to requirements in indictment charging a previous conviction, and article 676, *post*, as to procedure thereon.

357. Additional punishment when value exceeds two hundred dollars.—If the value of anything stolen, or in respect of which any offence is committed for which the offender is liable to the same punishment as if he had stolen it, exceeds the sum of two hundred dollars the offender is liable to two years' imprisonment, in addition to any punishment to which he is otherwise liable for such offence. R.S.C., c. 164, s. 86.

PART XXVII.

OBTAINING PROPERTY BY FALSE PRETENSES AND OTHER CRIMINAL FRAUDS AND DEALINGS WITH PROPERTY.

FALSE PRETENSES.

358. Definition.—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.

The above article is in the exact words of section 270 of the English Draft Code.

359. Punishment for obtaining by false pretenses.—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.

As stated by the Royal Commissioners, (1) it was necessary to assign separate provisions to this offence, although in point of mischief and moral guilt, it is much the same as theft.

The distinction between it and theft seems to be that, in theft, the owner of the thing, in question has no intention to part with his property therein to the person obtaining it, while in the case of an obtaining by false pretenses he has an intention to part with the thing, but his consent to part with it is brought about by the false pretense made to him (2). "If, said 'Parke, B.,' a person, through the fraudulent representations of another, delivers to him a chattel, intending to pass the property in it, the latter cannot be indicted for larceny, but only for obtaining the chattel under false pretenses." (3)

The cases already cited under the head of theft that if a servant, (acting under a general authority co-equal with his master's), intentionally parts with his master's property, under a misconception fraudulently induced by false representations as to the real facts, such property is not said to be stolen, but obtained by false pretenses; but, if the servant, having only a limited authority, and being precluded from parting with the property, is, nevertheless, tricked out of it, the offender thus obtaining it is guilty of theft; because the master has never consented to nor authorized the parting with it. (4)

To constitute the crime of obtaining by false pretenses there must be; 1, a false statement, which represents, as existing, something which does not exist, or which represents, as having happened or existed, something which has not happened or has not existed; 2, the offender must also have known at the time of making the false statement or representation that it was false; and 3, the goods in question must have been parted with in consequence of and through the false representation.

If a man represents as an existing fact that which is not an existing fact (5), and so gets the money or chattels of another, that is a false pretence (6), it being for the jury to say whether or not the defendant, at the time he did the act, had guilty knowledge of the quality of such act; (7) and "whether or not the pretences used were the means of obtaining the property." (8) For instance, there is a false pretence where a person goes to a shop and says 'that he is sent by some particular customer for such and such goods,' which, upon the faith of what he says, are handed to him; or where the secretary of a benefit society obtains money from one of its members by representing that a certain amount, exceeding that actually due, is owing by such member to the society (9); or where money is obtained by means of a begging letter setting forth false statements as to the name and circumstances of the accused (10);

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(1) See Remarks of Royal Commissioners, at p. 272, *ante.*
(2) White v. Garden, 10 C. B. 927; Reg. v. Barnes, 2 Den. C. C. 59.
(3) Powell v. Hoyland, 6 Exch. 70; R. v. Adams, Russ. & Ry. 225.
(4) Reg. v. Prince, L. R. 1 C. C. 150.
(5) The offence "is constituted by the pretence that something has taken place which in fact has not taken place;" per Kelly, C. B., Reg. v. McGrath L. R. 1 C.C. 209.
(6) Reg. v. Woolley, 1 Den. C. C 559; Reg. v. Welman, Dears, 188: Reg. v. Archer, Dears. 449; Reg. v. Thompson L. & C. 233; Reg. v. Lee, L. & C. 309. Reg. v. Kerrigan, L. & C. 383.
(7) R. v. Francis, L. R. 2 C. C. 128.
(8) 2 Russ. Cr. 3 Ed. 289 n.
(9) Reg. v. Woolley, 1 Den. C.C. 559.
(10) Reg. v. Jones, 1 Den. C.C. 551.

or where A, the accused, falsely represents that he is connected with B., a person of known opulence, and on the faith of such representation obtains for himself property (1); or where C., by fraudulently pretending that a genuine £1 Irish bank-note is a £5 note, obtains from D. the full value of a £5 note in change (2); or where E. with intention to defraud pays for goods by a cheque, stating that he wishes to pay ready money for them, but knowing at the time that he has only a nominal balance at the bank on which the cheque is drawn, that he has no power to overdraw his account, and not intending to pay money in to meet the cheque. (3)

There must be a knowingly false statement of a supposed by-gone or existing fact made with intent to defraud, and an obtaining of the money by means of that representatibn (4). A mere representation as to some *future* fact or a false *promise* by the party charged, that he will do or means to do a particular act, will not suffice to constitute a false pretence; (5) unless it be conjoined with a false pretence as to an existing fact. (6)

It is sometimes difficult to distinguish between a mere breach of warranty or a false representation, for instance, as to the profits of a business and the statutory offence of obtaining or attempting to obtain money by false pretences. It was held in the case of Reg. v. Bryan that if goods of a certain kind be sold under a misrepresentation knowingly made as to their value,—though not of a definite fact,—the statutable offence of obtaining money by false pretences will *not* have been committed. "The legislature," observed Lord Campbell, C. J., "could not have intended to make it an indictable offence for a seller to exaggerate the quality of the goods he is selling, any more than to make criminal the act of a purchaser who strives during the bargain to depreciate their quality, and so induces the seller to part with the goods at a lower price." (7) And Coleridge, J., expressed himself similarly. "It is," he said, "a safe rule, that where the false representation applies merely to the quality, and is in the nature of exaggeration on the one hand, or depreciation on the other, which may take place between parties even in tolerably honest transactions, the statute does not apply."

Where a manufacturer's foreman who was in the habit of receiving, from his master, money to pay the workmen, obtained from him,—by means of false written accounts of the men's earnings,—more than the men had really earned and more than he paid them, the judges held this to be within the statute; they said that all cases where the false pretence creates the credit are within the act; and here the defendant would not have obtained the excess over what was really due to the workmen were it not for the false pretence made by the false account delivered by him to the master. (8)

It was A.'s duty to ascertain daily the amount of dock dues payable by B., his master, and to apply to C., his masters' cashier for the amount and then pay it in discharge of the dues. On one occasion by falsely and knowingly representing to C. that the amount was larger than it really was, A. obtained from C. this larger amount, and then paid the real amount due appropriating the difference to his own use. *Held*, not larceny, but obtaining money by false pretences. (9)

A. obtained goods by falsely stating that he wanted them for B. who was a

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(1) Reg. v. Archer, Dearsl. 449.
(2) Reg. v. Jessop, Dearsl. & B., 442. See also Reg. v. Evans, Bell C. C. 187.
(3) Reg. v. Hazelton, L. R. 2 C. C. 134.
(4) Reg. v. Welman, Dears. 198; Reg. v. Hewgill, Dears. 315; Reg. v. Bulmer, L. & C. 476; Reg. v. Giles. L. & C. 502.
(5) Reg. v. Johnson; 2 Moo. C. C. 254.
(6) Reg. v. Jennison, L. & C. 157.
(7) R. v. Bryan, Dears. & B. 265.
(8) R. v. Witchell, 2 East, P. C. 830.
(9) R. v. Thompson, L. & C. 233; 32 L. J. (M. C.) 57.

person whom he would trust with £1000, and who went out to New Orleans twice a year to take goods to his sons. *Held*, a sufficient false pretence. (1)

Obtaining as a loan,—from the drawer of a bill accepted by the prisoner and negociated by the drawer,—part of the amount, for the purpose of paying the bill under the false pretence that the prisoner was ready with the remainder of the amount, was held to be an offence within the statute, the prisoner being shewn not to be prepared with the remainder of the amount of the bill and not intending to so apply the money obtained from the drawer. (2)

Where A. obtained goods from B. by a false statement that a bill,—drawn on and accepted by himself, and purporting to be payable at the London and Westminster Bank, which bill he gave to B. for the price of the goods—would be paid at the bank the next day, *and that he had made arrangements for it*, this was held to be a sufficient false pretence. (3)

A. the secretary of an Odd Fellows' Lodge told B., a member that he owed the lodge 13 s 6 d., and thereby obtained that sum from him fraudulently, whereas B. owed 2 s. 2 d. only. *Held*, rightly convicted of obtaining money by false pretences. (4)

A creditor who wilfully and fraudulently represents to a third person, who holds money of his debtor, that a larger sum is due to him from the debtor than is really the case, and thus obtains from such third person payment of the larger sum, was held guilty of a false pretence within the statute, and that too, although he had obtained a judgment by default, not set aside, against his debtor for the larger amount. (5)

Where A. obtained money from B., a woman, under the threat of an action for breach of promise of marriage, he, A., being, in fact, a married man, already, an indictment, charging that he had falsely pretended that he was entitled to maintain an action against B. for the breach of promise was held by Maule, J., to be good. (6)

An indictment, charging A. with obtaining money from B, whose husband had run away, by falsely pretending, to B., that she, A., had power to bring back B's husband was held good. (7)

A. pretended to be carrying on an extensive business as a surveyor and house agent, and thereby induced B. to deposit with him £25 as a security for his, B's fidelity as a clerk, whereas A. was not carrying on any business as a surveyor or house agent. *Held* to be a false pretence. (8)

A municipality having provided some wheat for the poor. A. obtained an order for fifteen bushels, described as "three of golden drop, three of fife, nine of milling wheat." Some days afterwards he went back, and represented that the order had been accidentally destroyed, when another was given to him. He then struck out of the first order "three of golden drop, three of fife," and, presenting both orders, obtained, in all, twenty-four bushels. The indictment charged that A. unlawfully, fraudulently, and knowingly, by false pretences, did obtain an order from B. one of the municipality of C. requiring the delivery of certain wheat, by and from one D., and, by presenting the said order to D., did fraudulently, knowingly, and by false pretences, procure a certain quantity of wheat, etc., from the said D. of the goods and chattels of the said municipality, with intent to defraud. *Held*, that the indictment was sufficient, and not

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(1) R. v. Archer, Dears. 449.
(2) R. v. Crossley, 2 M. & Rob., 17.
(3) R. v. Hughes, 1 F. & F. 355.
(4) R. v. Woolley, 1 Den. 559 ; 3 C. & K. 98 : 19 L. J. (M. C.) 165.
(5) R. v. Taylor, 15 Cox, 265, 268.
(6) R. v. Copeland, C. & Mar 516.
(7) R. v. Giles, L & C. 502 : 34 L. J. (M. C.) 50.
(8) R. v. Crabb, 11 Cox, C. C. R. 85.

uncertain or double, but in effect charged that A. obtained the order, and, by presenting it, obtained the wheat, by false pretences. (1)

An indictment containing several counts charged A. with obtaining money under false pretences, and the evidence went to show that he had, by fraudulent misrepresentations of the business he was doing in a trade, induced B. to enter into a partnership agreement, and advanced £500 to the concern; but it did not appear that the trade was altogether a fiction, or that B. had repudiated the partnership. The question being whether, upon such evidence, the jury were bound to convict, it was held that A. was entitled to an acquittal, as it was consistent with the evidence that B., as a partner, was interested in the money obtained. (2)

A., who had been discharged from B's service, went to the store of C. and D., and, representing himself as still in the employ of B., who was a customer of C. and D., asked for goods in B's name, which were sent to B's house, where the prisoner preceded the goods, and, as soon as the clerk delivered the parcel, snatched it from him, saying, "This is for me; I am going in to see B."; but, instead of doing so, walked out of the house with the parcel. *Held*, that A. was rightly convicted of obtaining the goods from C. and D, by false pretences. (3)

A. obtained a coat, by falsely pretending that a bill of a coat of the value of 14s. 6d., of which 4s. 6d. had been paid on account, was a bill of another coat of the value of 22s., which he had had made to measure, and that 10s. only were due; it was proved that A's wife had selected the 14s. 6d. coat for him, at B's shop, subject to its fitting, on his calling to try it on, and had paid 4s. 6d. on account, for which she received a bill, in which credit was given for the 4s. 6d., so paid on account On A. calling at B's shop, afterwards, to try on the coat, it was found to be too small, and he was then measured for one, which he ordered to be made, to cost 22s. On the day named for trying on this second coat, A. called, and the coat was fitted on by B., who had not been present on the former occasion; and the case stated that A., on the coat being given to him, handed 10s. and the bill of parcels for the 14s. 6d. coat, saying, "There is 10s. to pay," which bill B. handed to his daughter, to examine, and upon that A. put the coat under his arm, and, after the bill of parcels referred to had been handed to him with a receipt, went away. B. stated that, believing the bill of parcels to be a genuine bill, and that it referred to the second coat which was taken away by A., he parted with that coat on payment of the 10s., which otherwise he should not have done. *Held* that there was evidence to go to the jury, and that the conviction was right. (4)

A. sold to B., a railway pass, representing it to be valid in the hands of B., who believed it to be transferrable but as a matter of fact it was not transferrable but only good to carry a particular person, and could not be used, by B., except by committing a fraud upon the railway company, and at the risk of being, at any moment, expelled from the train, A. was held guilty of obtaining by false pretences the money paid to him, by B., for such pass. (5)

The false representation by a person that he is in a large way of business, whereby he induces another to give him goods, is a false pretence. (6) So also is the obtaining a loan upon the security of a piece of land, by falsely and fraudulently representing that a house is built upon it. (7) And threatening to sue on a note made in favor of the prisoner, and which he had negotiated but pre-

(1) Reg. v. Campbell, 18 U. C, Q. B. 413.
(2) Reg. v. Watson, U. C. L. J. 73; Dears. & B. 348; 27 L. J. (M. C.) 18.
(3) Reg. v. Robinson, 9 L. C. R. 278.
(4) R. v. Steels, 16 W. R. 341.
(5) R. v. Abrahams, 24 L. C. J. 325.
(6) Reg. v. Cooper, L. R. 2 Q. B. D. 510.
(7) Reg. v. Burgon, 2 U. C. L. J. 138; Dears. & B. 11; 25 L. J. (M. C.) 105; Reg. v. Huppel, 21 U. C. Q. B. 281.

tended he was still the holder of, thereby inducing the prosecutor to pay him is a false pretence. (1)

A prisoner who had obtained money and goods by pretending that a paper which he produced was the bank note of an existing solvent bank, which he knew had stopped payment forty years before, was held guilty of obtaining by false pretences. (2)

Where A. fraudulently misrepresented an Irish bank note of £1. to be one of £. 5, and thereby obtained from B., in change, a larger sum than its value, he was held guilty of obtaining money by false pretences, although B. had the means of detection at hand, on the face of the note, and although the note was a genuine one. (3)

If the purchaser intends to buy a *particular substance*, and the seller passes off to him a counterfeit,—and money is thus obtained,—that is a false pretence within the statute. (4) And it may also be constituted by a fraudulent representation as to the *quantity* of goods sold. For instance, where A. having contracted to sell and deliver to B. a load of coals at 7d per cwt. delivered to her a load which he knew weighed only 14 cwt, but which he stated to her contained 18 cwt and produced a ticket, to that effect, which he said he himself had made out, when the coals were weighed, and she thereupon paid him the price as for 18 cwt, which was 2s, 4d more than was really due, it was held that A was indictable for obtaining the 2s 4d by false pretences. (5)

Inducing a person to buy some packages of tea by representing the packages to contain good tea, when three fourths of the contents were to the defendant's knowledge, not tea at all but a mixture of substances unfit to drink, was held a false representation of an existing fact. (6)

In defining false pretences, article 358 expressly states, in the second paragraph, that exaggerated commendation or depreciation of the quality of a thing is not a false pretence, *unless it goes so far as to amount to a fraudulent misrepresentation of fact*. Thus, where A. induced B. to buy from him a chain by fraudulently representing that it was of 15-carat gold, whereas in fact it was of a quality little better than 6-carat gold—knowing at the time that he was falsely representing the quality of the chain, it was held that A. could properly be convicted of obtaining money by false pretences—there being here a statement as to a specific fact within the actual knowledge of the prisoner, *viz.*, the proportion of pure gold in the chain. (7)

A person who obtained from a pawnbroker, upon an article which he falsely represented to be silver, a greater advance than would otherwise have been made, was held guilty of a false pretence ; although the pawnbroker had the opportunity of testing the article at the time. (8)

A false representation that a stamp on a watch is the hall-mark of the Goldsmiths' Company, and that the number 18, part thereof, indicates that it is made of eighteen carat gold, is a false pretence, and is not the less so, because accompanied by the representation that the watch is a gold one, and some gold is proved to have been contained in its composition. (9)

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(1) Reg. v. Lee, 23 U. C. Q. B. 340.

(2) R. v. Dowey, 16 W. R. 344 ; 37 L. J. (M. C.) 52 ; R. v. Brady 26 U. C. Q. B. 14.

(3) R. v. Jessop. Dears & B. 442 ; 27 L. J. (M. C.) 70.

(4) R. v. Ragg, Bell. C C. 218 ; 29 L. J. (M. C.) 86.

(5) Reg. v. Sherwood, Dears. & B. 251 ; 26 L. J. (M. C.) 81, Reg. v. Lee L. & C. 418 ; 33 L. J. (M. C.) 129.

(6) R. v. Foster, L. R., 2 Q. B. D. 301.

(7) Reg. v. Ardley, L. R. 1 C. C. 301.

(8) R. v. Ball., C. & Mar. 249 ; R. v. Roebuck, Dears. & B. 24 ; 25 L. J. (M. C.) 101 ; R. v. Goss, Bell, 208 ; 29 L. J, (M. C.) 86.

(9) R. v. Suter, 10 Cox, 577.

Where A induced B to buy and pay for a cheese of inferior description by making the wilfully false statement that a tester of a different and superior cheese, which he produced as a sample, formed part of and had been taken out of the cheese which he so induced B to buy, it was held that he might be convicted of obtaining money by false pretences. (1)

A person who sold spurious blacking which he represented to be "Everetts Blacking" was held to be indictable for false pretences. (2)

It is not necessary that the pretence should be in words; the conduct and acts of the party may be sufficient to constitute a false pretence, without any verbal representation thus, giving, in payment, for goods obtained, a cheque upon a banker with whom the defendant has, in fact, no account is a false pretence. (3) But if the defendant at the time of giving the cheque, believes, although he has no account at the bankers upon whom he draws the cheque, that the cheque will be paid at that bank on presentation he cannot be convicted of a false pretence. Thus where A bought a mare and paid for her on Thursday, by a cheque drawn on B., a banker, with whom he had no account, but told C., from whom he bought the mare, and to whom he gave the cheque, not to present it until Saturday, to which C assented, but C, nevertheless, presented it on the same day, Thursday, when it was dishonored, and it appeared, from the evidence, that A was, on Thursday, in daily expectation of having money paid to him which would have enabled him to place the banker in funds to meet the cheque on the Saturday, it was held that there was no false pretence. (4)

A man who makes and gives a cheque for the amount of goods purchased in a ready-money transaction, makes a representation that the cheque is a good and valid order for the amount inserted in it; and if the man has only a colorable account at the bank on which the cheque is drawn, without available assets to meet it, and has no authority to over draw, and knows that the cheque be dishonored on presentation, and intends to defaud, he may be convicted of obtaining the goods by false pretences. (5)

A. falsely pretended that a post dated cheque, drawn by himself, was a good order for £25 and worth that amount, whereby he obtained from B, a watch and chain. It was proved that before the completion of the sale and delivery of the watch to A., the latter represented that he had an account with the bankers on whom the cheque was drawn, that he had a right to draw the cheque, and that it would be paid on or after the day of its date. The jury found that these representations were false and that A had no funds to pay the cheque and had no reasonable grounds to believe that it would be paid. *Held*, rightly convicted. (6)

Fraudulently offering a "flash note" in payment, under the pretence that it is a bank note is a false pretence. (7)

A person who fraudulently obtains goods by forwarding to the vendor the half of a bank note, which has been cut in two, he having previously parted with the corresponding half to a third party is guilty of obtaining the goods by false pretences; for, by forwarding the half note he represents that he has the corresponding half ready for the vendor. (8)

Where a person, at Oxford, not being a member of the University, went, for the purpose of fraud, wearing a University commoner's gown, and, in this

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(1) R. v. Goss, Bell, 208; 29 L. J. (M.C.) 90.
(2) R. v. Dundas, 6 Cox, 380.
(3) R. v. Lara, 6 T. R. 565; R. v. Flint, R. & R. 460. R. v. Jackson, 3 Camp. 370; R. v. Hunter, and R. v. Carter, 10 Cox, 642, 648.
(4) R. v. Walne, 11 Cox, C.C.R, 647.
(5) R v. Hazleton, L. R., 2 C.C.R., 134; 44 L. J. (M. C.) 11.
(6) R. v. Parker, 2 Mood. C. C. 1; 7 C. & P. 825.
(7) R. v. Coulson, 1 Den. 592; 19 L. J. (M. C.) 182.
(8) R. v. Murphy, 13 Cox, 298, (Irish C. C. R.).

garb, obtained goods, it was held a sufficient false pretence to satisfy the statute, although no representation passed in words. (1)

A. was convicted of obtaining money from B., by falsely pretending that there was a person named A. Brient living at Holt, Trowbridge, who was a minister of religion, and had instituted a "*bonâ fide* competition for the production of the greatest number of words from the word *Bernardo*, and had made arrangements to present prizes, of the respective amounts of £2, £1, and 10s., to the successful competitors, and had further arranged to give the proceeds derived from the entrance fees of competition, (after deducting the prizes) to Dr Bernardo's Home for Destitute Children; and the evidence that A. had so pretended was that he had inserted, in a newspaper, the following advertisement:—"Bernardo, £2, £1, 10s., for the most words from Bernardo. Proceeds to go to Dr Bernardo's Home for Destitute Children Alphabetical lists with 1s. 3d., to Revd. A. Brient, Holt, Trowbridge, Wilts." *Held*, affirming the conviction, that the words in the advertisement were reasonably capable of the construction put upon them in the indictment, and that it was a question for the jury whether A. intended B. to put that construction upon them. (2)

The jury may connect together representations made in several distinct conversations, (supposing them to be in their nature connectible), and convict the defendant for obtaining money by means of false pretences made in the several conversations. (3)

With regard to proof of the falsity of the pretences made use of, it does not seem essential that they should all be proved. If so many of them as shew the falsity of the substance of the pretence be proved it would appear to be sufficient. Take, for instance, the following case; A. goes and says to B., a jeweller: "I am the clerk of C., who has sent me to pick out and get from you, a gold chain, for about the price of $25, which he says he will call and pay you in a few days;" and by means of this representation A. obtains from B. a gold chain. Now, suppose, on the trial of A. for obtaining the chain by false pretences, it should turn out that A. was really the servant of C., and, that, therefore, there was nothing false about that part of his statement, still, if it were also to appear that he had received no instructions from C. to get the chain, and, that, after obtaining it, he converted it to his own use, the evidence would be sufficient to warrant his conviction.

It appears, also, that it is not necessary that the falsity of the pretences should be shewn by direct evidence. Thus, where the pretences charged were that A. had a carriage and pair, which he expected down in a few days, and that he had large property abroad; and there was no direct evidence to shew that he had no carriage and no property abroad, but there was evidence shewing that three days before he made the pretences he was in another place assuming to be a man of position and wealth, although really in a destitute condition, and unable to pay his hotel and other bills, it was held that there was evidence from which the jury might infer that the pretences were false. (4)

Although it must be shewn that the defendant obtained the money or goods with intent to defraud, it is only necessary to shew a general intent to defraud; it is not necessary to allege, that the intent was to defraud any particular person; (5) and if the evidence shew that there was, on the part of the defendant, an intent to defraud, it will be sufficient.

The intent to defraud may be implied from the facts of the case. A. owed B. a debt of which B. could not obtain payment, and C., B's servant, went to A's wife and obtained from her two sacks of malt by telling her that B. had bought them of A., and C. knew this to be false but took the malt to B., his

(1) R. v. Barnard, 7 C. & P. 784.
(2) R. v. Randell, 16 Cox, C. C. R., 335.
(3) R. v. Wellman, Dears. 188; 22 L. J. (M. C.), 118.
(4) R. v. Howarth, 11 Cox, C. C. R., 588.
(5) See Article 613 (*c.*), *post*.

master, to enable him to thereby pay him the debt owing to him by B. *Held*, that C. could not be convicted of obtaining the malt by false pretences with intent to defraud. (1)

The fact that the defendant, at the time of obtaining goods by false pretences, intended to pay for them when able to do so, affords no defence. (2)

In a case in which the indictment averred an obtaining of a particular sum of money, with intent to defraud the prosecutor of the same, and it appeared that the intent was to defraud him of a part only of that sum, the rest of the amount being really due, it was held, nevertheless, that the prisoner might be convicted. (3)

On an indictment for attempting to obtain money by falsely pretending that a ring was composed of diamonds when in fact it was composed of crystals, it was held that, to shew the defendant's guilty knowledge and his intent to defraud, evidence was admissible of a false pretence, by the defendant, on a prior occasion, to another person that a chain was gold, whereas it was plated, and on another distinct occasion, that a ring was of diamonds, which it was not. (4)

Where, on a trial for obtaining by false pretences the verdict was one of guilty with these additional words,—"but whether there was any intent to defraud, the jury consider there is not sufficient evidence and therefore strongly recommend the prisoner to mercy," it was held that this was equivalent to a verdict of not guilty, as it negatived one of the most material ingredients in the offence, namely, the intent to defraud. (5)

The parting with the money or goods must have been induced by the false pretence; and, therefore, where A. made false representations to and thereby induced B., to sell him, A., some horses, but B., afterwards, on learning the falsity of the representations, entered into a new agreement in writing with the prisoner, it was held that the subsequent dealings repelled the idea that the prosecutor had parted with his property in consequence of the false pretence. (6)

A. was charged with obtaining, from B., a filly, by falsely pretending to be a gentleman's servant and to have lived at Bream and by also pretending that he had bought horses at Bream fair. It appeared that A. bought the filly of B. at the price of £11, and that besides making the above false pretences, he told B. that he would come down to the "Cross Keys" and pay him. B. stated in evidence that he parted with the filly, *because he expected A. would come to the "Cross Keys" and pay him*, and not because he believed that A. was a gentleman's servant, etc. *Held*, that A. was entitled to an acquittal. (7)

Where A. had fraudulently obtained, from B., some goods on approval, and had falsely represented to B. that she, A., was the daughter of a Mrs S. A., of C.; but there was no evidence to shew that B. knew Mrs S. A. of C., or that the goods had not been delivered to A., before she made the false representation, or that the goods were parted with by B., on the faith of the false representation, it was held that the conviction of A. for obtaining the goods by false pretences could not be sustained. (8)

Where the defendant offered to pledge with a pawnbroker, a chain which he falsely represented to be silver, but the pawnbroker stated that he advanced money on it, not in consequence of defendant's statement but in reliance on its withstanding a test which he himself applied to it, it was held that the

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(1) R. v Williams, 7 C. & P. 354.
(2) R. v. Naylor, L. R. 1 C. C. R. 4; 35 L. J. (M. C.) 61
(3) R. v. Leonard, 1 Den. 303; 2 C. & K. 514.
(4) R. v. Francis, L. R., 2 C. C. R., 128; 43 L. J. (M. C.) 97.
(5) R. v. Gray, 17 Cox. C. C. R., 299.
(6) R. v. Connor, 14 U. C., C. P., 529.
(7) R. v. Dale, 7 C. & P. 352.
(8) R. v. Jones, 15 Cox, C. C. R., 475.

defendant could not be convicted of obtaining the money by means of the false pretence but that he was properly convicted of *attempting* to obtain money by false pretences. (1)

Wherever the prosecutor himself knows the falsehood of the pretence but parts with his money or goods, notwithstanding, the defendant cannot be convicted of obtaining by false pretences; (2) but he may in such a case be convicted of attempting to obtain by false pretences, although the indictment charges him with obtaining. (See article 711, *post.*)

The mere fact of the prosecutor having the means at hand of acquiring knowledge of the falsity of the pretence will not of itself excuse the defendant so as to prevent him from being convicted of obtaining by false pretences. (3)

If the defendant has obtained money by a false pretence, knowing that it was false, it is no answer to shew that the party from whom he obtained it laid a plan to entrap him into the commission of the offence (4). *Quaere*, would not this depend upon whether the party from whom the money was obtained knew of the falsity of the pretence. (See R. v. Mills, *supra.*)

Parol evidence has been held admissible to prove the false pretences laid in the indictment, although a deed made between the parties and stating a different consideration for parting with the money was put in evidence for the prosecution; such deed having been made for the purpose of the fraud. (5)

Where the defendant sold to the prosecutor a reversionary interest which he had previously sold to another, and the prosecutor took a regular assignment of it, with the usual covenants for title, Littledale, J. ruled that the defendant could not be convicted for obtaining money by false pretences; for if this were within the statute every breach of warranty, or false assertion at the time of a bargain might be treated as such (6). In R. v. Kenrick the above ruling of Littledale, J. was much questioned; and it was strongly intimated that the execution of a contract between the parties does not secure from punishment the obtaining of money under false pretences, in conformity with that contract. (7) And in R. v. Abbott, it was decided unanimously by the judges upon a case reserved, that the law was so. (8)

It will be noticed that article 359 expressly declares that the obtaining by false pretence shall be punishable whether it is done directly or through the medium of a contract.

H. Page sold, to H. Pagnuelo, for $150, a horse described in a written document signed in duplicate by the parties at the completion of the sale, in which document it was stated that the purchase money was paid by Pagnuelo, the purchaser, on the faith of the warranty contained in the document, and not upon any verbal representations, and in which it was stipulated that if the horse should not come up to what it was warranted to be by that document, Page would repurchase it from Pagnuelo if brought back within thirty days in the same condition as when sold. On the day following the delivery of the horse and payment of the price, criminal proceedings were instituted by Pagnuelo, charging Page with having obtained the $150 by false pretences. At the trial in June 1892, before Taschereau, J., in the Court of Queen's Bench, at Montreal, objection was made on behalf of the defendant, Page, to the

(1) R. v. Roebuck, Dears. & B., 24; 25 L. J. (M. C.) 101.
(2) R. v. Mills, Dears. & B. 205; 26 L. J. (M. C.) 79.
(3) See Reg. v. Jessop, at p 316 *ante.*
(4) R. v. Ady, 7 C. & P. 140
(5) R. v. Adamson, 2 Mood. C. C., 286; 1 C. & K. 192.
(6) R. v. Codrington, 1 C. & P. 661.
(7) R. v. Kenrick, 5 Q. B. 49; Dav. & M. 208.
(8) R. v. Abbott, 1 Den. 173; 2 C. & K. 630; R. v. Burgon, Dears. & B. 11; 25 L. J. (M. C.) 105; R. v. Goss, Bell, 208; 29 L. J. (M. C.) 86; R. v. Meakin, 11 Cox, C. C. R., 270.

adduction of any verbal evidence to contradict the writing, and especially that part of it, expressly declaring that the prosecutor, Pagnuelo, paid the money on the faith of the warranty contained in the writing and not upon any verbal representations. The Crown counsel. however, took the ground that the writing was a part of the alleged fraud, and resisted the defendant's counsel's objection, which was overruled; and verbal evidence was admitted to shew (*inter alia*), that the defendant, Page, had, before the completion of the sale, and before the signing of the written document, represented to the prosecutor, Pagnuelo, that the horse was a high bred, fast trotting horse, called "*Prince Wilkes*," well known in the sporting world, and upon this evidence and proof of some other facts of minor importance (including evidence that the horse was worth from $80 to $110, the defendant, Page, was found guilty and sentenced to three years imprisonment. (1)

If the false pretence be in writing and it be lost, it may be proved by secondary evidence. (2)

It will be seen by article 616, (par. 2), that it is not necessary to set out the false pretences in the indictment; but the Court may order the prosecutor to furnish a particular thereof.

360. Obtaining execution of valuable security by false pretence.—Every one is guilty of an indictable offence and liable to three years' imprisonment who, with intent to defraud or injure any person by any false pretence, causes or induces any person to execute, make, accept, endorse or destroy the whole or any part of any *valuable security*, or to write, impress or affix any name or seal on any paper or parchment in order that it may afterwards be made or converted into or used or dealt with as a valuable security, R.S. C., c. 164, s. 78.

See article 3 (*cc.*), *ante*, for definition of valuable security.

A was convicted on an indictment charging him with falsely pretending to B that he "was prepared to pay him £100," and thereby fraudulently inducing him to "make a certain valuable security, to wit, a promissory note with intent thereby to defraud B." *Held*, that the indictment was good, as it must be taken by necessary inference to allege a false pretence by A, of an existing fact, viz: that he was prepared to pay £100, and had it ready for him on his signing the note. (3)

361. Falsely pretending to enclose money in a letter.—Every one is guilty of an indictable offence and liable to three years' imprisonment who, wrongfully and with wilful falsehood, pretends or alleges that he enclosed and sent, or caused to be enclosed and sent, in any post letter any money, *valuable security* or chattel, which in fact he did not so enclose and send or cause to be inclosed and sent therein. R.S.C., c. 164, s. 79.

It is not necessary to allege in the indictment the intent to defraud. (See article 618, *post*).

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,

(1) Reg. v. Page, (not reported).
(2) R. v. Chadwick, 8 C. & P. 181.
(3) R. v. Gordon, 23 Q. B. D. 354; 58 L. J. (M. C.) 117.

fraudulently and unlawfully obtains or attemps 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.

Under article 3 (*bb.*), *ante*, 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 "*fideicommissaire*"; and the expression "trust" includes whatever is by that law an "*administration*" or "*fidéicommission.*"

Article 547, *post*, provides that no prosecution under article 363 shall be commenced without the sanction of the Attorney-General.

PART XXVIII.

FRAUD.

364. False accounting by official.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who, being a director, manager, public officer or member of any body corporate or public company, with intent to defraud—

(*a.*) destroys, alters, mutilates or falsifies any book, paper, writing or *valuable security* belonging to the body corporate or public company; or

(*b.*) makes, or concurs in making, any false entry, or omits or concurs in omitting to enter any material particular, in any book of account or other document. R.S.C., c. 164, s. 68.

Sections 97 and 98 of the Bank Act, R.S.C., c. 31, (which are still in force), contain the following provisions with regard to bank directors and officials:—

"Every one is guilty of a misdemeanor and liable to imprisonment for a term not exceeding two years who, being the president, vice-president, director, principal partner *en commandite*, manager, cashier or other officer of the bank, wilfully gives or concurs in giving any creditor of the bank any fraudulent, undue or unfair preference over

other creditors, by giving security to such creditor or by changing the nature of his claim or otherwise howsoever, and shall further be responsible for all damages sustained by any person in consequence of such preference." (Section 97.)

"The making of any wilfully false or deceptive statement in any account, statement, return, report or other document respecting the affairs of the bank is, unless it amounts to a higher offence, a misdemeanor punishable by imprisonment for a term not exceeding five years; and every president, vice-president, director, principal partner *en commandite*, auditor, manager, cashier, or other officer of the bank, who prepares, signs, approves or concurs in such statement, return, report or document, or uses the same with intent to deceive or mislead any person, shall be held to have wilfully made such false statement, and shall further be responsible for all damages sustained by any person in consequence thereof." (Section 99.)

Sections 100 and 101 of the Banking Act (which are also still in force), are as follows:—

"Every person assuming or using the title of 'bank,' 'banking company,' 'banking house,' 'banking association' or 'banking institution,' without being authorized so to do by this Act, or by some other Act in force in that behalf, is guilty of an offence against this Act." (Section 100.)

"Every person, committing an offence declared to be an offence against this Act, shall be liable to a fine not exceeding one thousand dollars, or to imprisonment for a term not exceeding five years, or to both, in the discretion of the court before which the conviction is had." (Section 101.)

365. False Statement by Official.—Every one is guilty of an indictable offence and liable to five years' imprisonment who, being a promotor, director, public officer, or manager of any body 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.

See article 3 (*v.*) for definition of "*Property*."

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.

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.

368. **Defrauding Creditors.**—Every one is guilty of an indictable offence and liable to a fine of eight hundred dollars and to one years' imprisonment who—

(*a.*) with intent to defraud his creditors, or any of them, (1)

(i.) makes, or causes to be made, any gift, conveyance, assignment, sale, transfer or delivery of his property ;

(ii.) removes, conceals or disposes of any of his property ;

or

(*b.*) with the intent that any one shall so defraud his creditors, or any one of them, receives any such property. R.S.C., c. 173, s. 28.

369. Every one is guilty of an indictable offence and liable to ten years' imprisonment who, with intent to defraud his creditors or any of them, destroys, alters, mutilates or falsifies any of his books, papers, writings or securities, or makes, or is privy to the making of any false or fraudulent entry in any book of account or other document. R.S.C., c. 173, s. 27.

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,

(1) See R. v. Rowlands, 8 Q. B. D. 530 ; 51 L. J. (M. C.) 51.

No prosecution for any offence under this article can be commenced without the leave of the Attorney General. See article 548, (*post.*)

371. Frauds in respect to the Registration of titles to land.—Every one is guilty of an indictable offence and liable to three years' imprisonment who, acting either as principal or agent, in any proceeding to obtain the registration of any title to land or otherwise, or in any transaction relating to land which is, or is proposed to be, put on the register, knowingly and with intent to deceive, makes or assists or joins in, or is privy to the making of any material false statement or representation, or suppresses, conceals, assists or joins in, or is privy to the suppression, withholding or concealing from any judge or registrar, or any person employed by or assisting the registrar, any material document, fact or matter of information. R.S.C., c. 164, ss. 96 and 97.

372. Fraudulent sales of real property.—Every one is guilty of an indictable offence and liable to one year's imprisonment, and to a fine not exceeding two thousand dollars, who knowing the existence of any unregistered prior sale, grant, mortgage, hypothec, privilege or encumbrance of or upon any real property, fraudulently makes any subsequent sale of the same, or of any part thereof. R.S.C., c. 164, ss. 92 and 93.

373. Fraudulent Hypothecation of Real Property.—Every one who pretends to hypothecate, mortgage, or otherwise charge any real property to which he knows he has no legal or equitable title is guilty of an indictable offence and liable to one year's imprisonment, and to a fine not exceeding one hundred dollars.

2. The proof of the ownership of the real estate rests with the person so pretending to deal with the same. R.S.C., c. 164, ss. 92 and 94.

374. Fraudulent seizures of land.—Every one is guilty of an indictable offence and liable to one year's imprisonment who, in the province of Quebec, wilfully causes or procures to be seized and taken in execution any lands and tenements, or other real property, not being, at the time of such seizure, to the knowledge of the person causing the same to be taken in execution, the *bonâ fide* property of the person or persons against whom, or whose estate, the execution is issued. R.S.C., c. 164, ss. 92 and 95.

375. Unlawful dealings with gold or silver.—Every one is guilty of on indictable offence and liable to two years' imprisonment, who—

(*a.*) being the holder of any lease or licence issued under the provisions of any Act relating to gold or silver mining or by any persons owning land supposed to contain any gold or silver, by fraudulent device or contrivance defrauds or attemps to defraud Her Majesty, or any person, of any gold, silver or money payable or reserved by such lease, or, with such intent as aforesaid, conceals or makes a false statement as to the amount of gold or silver procured by him; or

(*b.*) not being the owner or agent of the owners of mining claims then being worked, and not being thereunto authorized in writing by the proper officer in that behalf named in any Act relating to mines in force in any province of Canada, sells or purchases (except to or from such owner or authorized person) any quartz containing gold, or any smelted gold or silver, at or within three miles of any gold district or mining district, or gold mining division; or

(*c*) purchases any gold in quartz, or any unsmelted or smelted gold or silver, or otherwise unmanufactured gold or silver, of the value of one dollar or upwards (except from such owner or 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.

See articles 312 and 343, *ante*, as to concealment and thefts of gold, *etc.*

See article 571, *post*, as to search warrants.

See article 612, *post*, as to indictment.

376. Giving or using false warehouse receipts.—Every one is guilty of an indictable offence and liable to three years' imprisonment who—

(*a.*) being the keeper of any warehouse, or a forwarder, miller, master of a vessel, wharfinger, keeper of a cove, yard, harbour or other place for storing timber, deals, staves, boards, or lumber, curer or packer of pork, or dealer in wool, carrier, factor, agent or other person, or a clerk or other person in his employ, knowingly and wilfully gives to any person a writing purporting to be a receipt for, or an acknowledgment of, any goods or other property as having been received into his warehouse, vessel, cove, wharf, or other place, or in any such place about which he is employed, or in any other manner received by him, or by the person in or about whose business he is employed before the goods or other property named in such receipt, acknowledgment or writing have been actually delivered to or received by him as aforesaid, with intent to mislead, deceive, injure or defraud any person, although such person is then unknown to him; or

(*b.*) knowingly and wilfully accepts, transmits or uses any such false receipt or acknowledgment or writing. R.S.C., c. 164, s. 73.

377. Owners of merchandise disposing thereof contrary to agreements with consignees who have made advances thereon.—Every one is guilty of an indictable offence and liable to three years' imprisonment, who—

(*a.*) having in his name, shipped or delivered to the keeper of any warehouse, or to any other factor, agent or carrier, to be shipped or

carried, any merchandise upon which the consignee has advanced any money or given any valuable security afterwards, with intent to deceive, defraud or injure such consignee in violation of good faith, and without the consent of such consignee, makes any disposition of such merchandise different from and inconsistent with the agreement made in that behalf between him and such consignee at the time of or before such money was so advanced or such negotiable security so given; or

(*b.*) knowingly and wilfully aids and assists in making such disposition for the purpose of deceiving, defrauding or injuring such consignee.

2. No person commits an offence under this section who, before making such disposition of such merchandise, pays or tenders to the consignee the full amount of any advance made thereon. R.S.C., c. 164, s. 74.

378. Making false statements in receipts for property that can be used under the Bank Act; or fraudulently dealing with such property. —Every person is guilty of an indictable offence and liable to three years' imprisonment who—

(*a.*) wilfully makes any false statement in any receipt, certificate or acknowledgement 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 acknowldgment for any such grain, timber or other goods or property,—or having obtained any such receipt, certificate or acknowledgment, and after having endorsed or assigned it to any bank or person, afterwards, and without the consent of the holder or endorsee in writing, or the production and delivery of the receipt, certificate or acknowledgment, wilfully alienates or parts with, or does not deliver to such holder or owner of such receipt, certificate or acknowledgment, the grain timber, goods or other property therein mentioned. R.S.C., c. 164, s. 75.

379. Innocent Partners.—If any offence mentioned in any of the three sections next preceding is committted by the doing of anything in the name of any firm, company or copartnership of persons, the person by whom such thing is actually done, or who connives at the doing thereof, is guilty of the offence, and not any other person. R.S.C., c., 164, s. 76.

380. Offences Respecting Wrecks. Every one is guilty of an indictable offence and liable to seven years' imprisonment who, not having lawful title thereto, sells any vessel or wreck found within the limits of Canada. R.S.C., c. 81, s. 36 (*d*).

381. Every one is guilty of an indictable offence and liable, on conviction on indictment to two years' imprisonment, and on summary conviction before two justices of the peace to a penalty of four hundred dollars or six months' imprisonment, with or without hard labour, who—

(*a.*) secretes any wreck, or defaces or obliterates the marks thereon, or uses means to disguise the fact that it is wreck, or in any manner conceals the character thereof, or the fact that the same is such wreck, from any person entitled to inquire into the same ; or

(*b.*) receives any wreck, knowing the same to be wreck, from any person, other than the owner thereof or the receiver of wrecks, and does not within forty-eight hours inform the receiver thereof ;

(*c.*) offers for sale or otherwise deals with any wreck, knowing it to be wreck, not having a lawful title to sell or deal with the same ; or

(*d.*) keeps in his possession any wreck, knowing it to be wreck, without a lawful title so to keep the same, for any time longer than the time reasonably necessary for the delivery of the same to the receiver ; or

(*e.*) boards any vessel which is wrecked, stranded or in distress against the will of the master, unless the person so boarding is, or acts by command of the receiver. R.S.C., c. 81, s. 37.

See article 3 (*dd*) *ante*, for definition of "wreck."

382. Offences respecting old marine stores.—Every person who deals in the purchase of old marine stores of any description, including anchors, cables sails, junk, iron, copper, brass, lead and other marine stores, and who, by himself or his agent, *purchases* any old marine stores *from any person under the age of sixteen years*, is guilty of an offence and liable, on summary conviction, to a penalty of four dollars for the first offence and of six dollars for every subsequent offence.

2. Every such person who, by himself or his agent, purchases or receives any old marine stores into his shop, premises or places of deposit, except in the day time between sunrise and sunset, is guilty of an offence and liable, on summary conviction, to a penalty of five dollars for the first offence and of seven dollars for every subsequent offence.

3. Every person, purporting to be a dealer in old marine stores, on whose premises any such stores which were stolen are found secreted is guilty of an indictable offence and liable to five years' imprisonment. R.S.C., c. 81, s. 35.

OFFENCES RESPECTING "PUBLIC STORES."

383. Definitions.—In the next six sections the following expressions have the 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 Her Majesty's property in such stores, and it shall be lawful for any public department, and the contractors officers and workmen of such department to apply such marks, or any of them, in or on any such stores :—

Marks appropriated for Her Majesty's use in or on Naval, Military, Ordnance, Barrack, Hospital and Victualling Stores.

STORES.	MARKS.
Hempen cordage and wire rope.	White, black or coloured threads laid up with the yarns and the wire, respectively.
Canvas, fearnought, hammocks and seamen's bags.	A blue line in a serpentine form.
Bunting.	A double tape in the warp.
Candles.	Blue or red cotton threads in each wick, or wicks of red cotton.
Timber, metal and other stores not before enumerated.	The broad arrow, with or without the letters W. D.

Marks appropriated for use on stores, the property of Her Majesty in the right of her Government of Canada.

STORES.	MARKS.
Public stores,	The name of any public department, or the word " Canada," either alone or in combination with a Crown or the Royal Arms.

50-51 V., c. 45, s. 3 ; 53 V., c. 38.

See sections 1—4, of 38 & 39 Vict. c. 25, (Imp.)

See Article 709, *post*, as to proof in cases relating to public stores.

Article 570 authorizes searches of persons suspected of being in possession of public stores, and of vessels *etc.*, in which stolen or unlawfully obtained stores are suspected to be ; such searches to be made by any constable or peace officer deputed by a writing from any public department.

385. Unlawfully applying marks to public stores.—Every one is guilty of an indictable offence and liable to two years' imprisonment

who, without lawful authority, the proof of which shall lie on him, applies any of the said marks in or on any public stores. 50-51 V., c. 45, s. 4.

See sec. 4, of 38 & 39 Vict , c. 25 (Imp.)

386. Taking marks from public stores.—Every one is guilty of an indictable offence and liable to two years' imprisonment who, with intent to conceal Her Majesty's property in any public stores, takes out, destroys or obliterates, wholly or in part, any of the said marks. 50-51 V., c. 45, s. 5.

See sec. 5, of 38 & 39 Vict. c. 25 (Imp.)

387. Unlawful possession sale etc, of public stores.—Every one who, without lawful authority, the proof of which lies on him, receives, possesses, keeps, sells or delivers any public stores bearing any such mark as aforesaid, knowing them to bear such mark, is guilty of an indictable offence and liable on conviction on indictment to one year's imprisonment and, if the value thereof does not exceed twenty-five dollars, on summary conviction, before two justices of the peace, to a fine of one hundred dollars or to six months' imprisonment with or without hard labour. 50-51 V., c. 45, ss. 6 and 8.

For definition of *having in possession* see article 3 (*k*), *ante.*

See article 390 *post,* as to dealing with regimental necessaries.

388. Not satisfying justices that possession of public stores is lawful.—Every one, not being in Her Majesty's service or a dealer in marine stores or a dealer in old metals, in whose possession any public stores bearing any such mark are found who, when taken or summoned before two justices of the peace, does not satisfy such justices that he came lawfully by such stores so found, is guilty of an offence and liable, on summary conviction, to a fine of twenty-five dollars; and

2. If any such person satisfies such justices that he came lawfully by the stores so found, the justices, in their discretion, as the evidence given or the circumstances of the case require, may summon before them every person through whose hands such stores appear to have passed; and

3. Every one who has had possession thereof, who does not satisfy such justices that he came lawfully by the same, is liable, on summary conviction of having had possession thereof, to a fine of twenty-five dollars, and in default of payment to three months' imprisonment with or without hard labour. 50-51 V., c. 45, s. 9.

389. Searching for stores near Her Majesty's Vessels.—Every one who, without permission in writing from the Admiralty, or from some person authorized by the Admiralty in that behalf, creeps, sweeps, dredges, or otherwise searches for stores in the sea, or any tidal or inland water, within one hundred yards from any vessel belonging to Her Majesty, or in Her Majesty's service, or from any mooring place or anchoring place appropriated to such vessels, or

from any mooring belonging to Her Majesty, or from any of Her Majesty's wharfs or docks, victualling or steam factory yards, is guilty of an offence and liable, on summary conviction before two justices of the peace, to a fine of twenty-five dollars, or to three months' imprisonment, with or without hard labour. 50-51 V., c. 45, ss. 11 and 12.

390. Receiving regimental necessaries etc, from soldiers or deserters.—Every one is guilty of an indictable offence and liable on conviction on indictment to five years' imprisonment and on summary conviction before two justices of the peace to a penalty not exceeding forty dollars, and not less than twenty dollars and costs, and, in default of payment, to six months' imprisonment with or without hard labour who—

(*a.*) buys, exchanges or detains, or otherwise receives from any soldier, militiaman or deserter any arms, clothing or furniture belonging to Her Majesty, or any such articles belonging to any soldier, 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.

See sec. 13 of 38 & 39 Vict., c. 25, (Imp.) and note as to regimental necessaries at p. 908, Arch. Cr. Pl. & Ev. 21 Ed.

See 44 & 45 Vict., c. 58, s. 156 (Imp.), and note, at p. 908 of Archbold.

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 &c. 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 Her Majesty's Navy, and is borne on the books of any one of Her Majesty's ships in commission, and every person, not being an officer as aforesaid, who, being borne on the books of any hired vessel in Her Majesty's service, is, by virtue of any Act of Parliament of the United Kingdom for the time being in force for the discipline of the Navy, subject to the provisions of such Act.

4. The expression "seaman's property" means any clothes, slops, medals, necessaries or articles usually deemed to be necessaries for sailors on board ship, which belong to any seaman.

5. The expression "Admiralty," means the Lord High Admiral of the United Kingdom, or the Commissioners for executing the office of Lord High Admiral. R.S.C., c. 171. ss. 1 and 2.

393. Not satisfying justice that possession of seaman's property is lawful.—Every one in whose possession any seaman's property is found who does not satisfy the justice of the peace before whom he is taken or summoned that he came by such property lawfully is liable, on summary conviction, to a fine of twenty-five dollars. R.S.C., c. 171, s. 3.

394. Conspiracy to defraud.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who conspires with any other person, by deceit or falsehood or other fraudulent means, to defraud the public or any person, ascertained or unascertained, or to affect the public market price of stocks, shares, merchandise or anything else publicly sold, whether such deceit or falsehood or other fraudulent means would or would not amount to a false pretense as hereinbefore defined.

According to the general definitions of it, a conspiracy is an agreeing or combining, or confederating together, by two or more persons, to accomplish some unlawful purpose, or, to accomplish a lawful purpose by some unlawful means. (1)

In the English Commissioners' Report of 1843 they propose the following definition. "The crime of conspiracy consists in an agreement of two persons (not being husband and wife) or more than two persons, to commit a crime, or fraudulently or maliciously to injure or prejudice the public or any individual person" (2). And in 1848 they presented another definition as follows: "The crime of conspiracy consists in an agreement of two persons, (not being husband and wife), or more than two persons to defraud or injure the public or any individual person." (3)

(1) Russ. Cr. 3 Ed. 674; Reg. v. Bunn, 12 Cox, 316-339; Reg. v. Roy, 11 L. C. J. 93; Reg. v. Vincent, 9 C. & P. 91; Reg. v. Warburton, L. R. 1 C. C. R., 274; R. v. Seward, 1 A. & E. 706.

(2) Rep. Crim. Law Commrs. of 1843, p. 275.

(3) Rep. of Cr. Law Comm. of 1848, p. 65.

Bishop's definition is as follows:—"Conspiracy is the corrupt agreeing together of two or more persons to do, by concerted action, something unlawful either as a means or an end; (1) and he remarks, as to the gist of the offence,—namely, the combination,—that, "In many circumstances, if two or more combine to do a wrong,—whether, as the means to something else, or, as the contemplated end,—such mere *combining more endangers or disturbs the community* than would the executed wrong accomplished by a single will. This is the central idea in the law of conspiracy."

It is, doubtless, on account of the dangerous nature of the offence, as affecting the community at large, that the legislature has considered it expedient, in many instances, to deal more severely with a conspiracy to commit an offence than with the offence itself when committed, independently of any conspiracy. We thus find a challenge to fight a duel punishable by three years imprisonment, (Art. 91, *ante*); that either, to spread false news injurious to the public, (Art. 126 *ante*), or to publish a blasphemous libel, (Art. 170 *ante*), is punishable by one year's imprisonment, and that an assault occasioning bodily harm is punishable by three years imprisonment, (article 262, *ante*); but a conspiracy to commit any one of these offences would be punishable by seven years imprisonment. (See art. 527, *post*.)

The following are examples of *conspiracies to defraud*, punishable under the present article, 394.

A conspiracy to impose pretended wine upon a man as and for true and good Portugal wine in exchange for goods (2);

A conspiracy to defraud the public by means of a mock auction, that is, an auction with sham bidders, who pretend to be real bidders, for the purpose of selling goods at prices grossly above their worth; (3)

A conspiracy by a female servant and a man whom she got to marry her, to impersonate her master in order to defraud her master's relations of a part of his property after his death; (4)

A conspiracy to injure a man in his trade or profession; (5)

A conspiracy to shew by false and fraudulent representations that a horse bought by one of the defendants from the prosecutor was unsound, in order to induce him to accept less for it than the agreed price; (6)

A conspiracy to raise by false rumors the price of public funds; (7)

A conspiracy, by the promoters of a joint stock company, to cheat and defraud, by means of false pretences, those who might buy shares in the company; (8)

A conspiracy by persons to cause themselves to be reputed men of property, in order to defraud tradesmen; (9)

A conspiracy to defraud by means of false representations of the solvency of a bank or other mercantile establishment; (10)

A conspiracy to defraud the public by issuing and negociating bills in the name of a fictitious and pretended banking firm; (11)

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(1) 2 Bish. New Cr. L. Com. s. 171.
(2) R. v. Macarty, 2 Ld. Raym. 1179.
(3) R. v. Lewis, 11 Cox, 404.
(4) R. v. Taylor, 1 Leach, 47.
(5) R. v. Eceles, 1 Leach, 274.
(6) R. v. Carlile, Dears, 337; 23 L. J. (M. C.) 109.
(7) R. v. Aspinall 2 Q. B. D. 59; 46 L. J. (M. C.) 150; R. v. DeBeranger 3 M. & Sel. 67.
(8) R. v. Aspinall, 1 Q. B. D. 730; 45 L. J. (M. C.) 129; 2 Q. B. D. 48; 46 L. J. (M. C.) 145.
(9) R. v. Roberts, 1 Camp. 399.
(10) R. v. Esdaile, 1 F. & F. 213.
(11) R. v. Hevey, 2 East, P. C. 858.

A conspiracy by traders to dispose of their goods in contemplation of bankruptcy, with intent to defraud their creditors ; (1)

A conspiracy between A., one of two partners in a partnership concern and B. a third party to enable A. to cheat C., his partner, with regard to the division of the partnership property on a contemplated dissolution of the partnership (2)

A. and B. agreed together that A. should purchase, and that B. should aid him in purchasing goods on credit, apparently as an ordinary purchaser, A, not intending to pay for them, and B. knowing that he did not intend to pay. *Held*, a conspiracy to defraud. (3)

If the parties conspire to obtain money by false pretences of existing facts it seems to be no objection to the indictment for conspiracy that the money was to be obtained through the medium of a contract (4)

See articles 613 and 616, *post*, as to requisites of indictment.

An indictment charging a conspiracy "by divers false pretences and indirect means to cheat and defraud A. of his monies," was held good. (5)

But an indictment charging a conspiracy to defraud the creditor of W. E. (not saying of what), was held too general. (6)

The conspiracy itself is the offence, that is to say the offence is completed by the combination and agreement ; (7) and, therefore, it is not necessary, although it is usual, to set out, in the indictment, the overt acts, that is, those acts which may have been done by any of the conspirators, in order to effect the common purpose of the conspiracy. (8)

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 design rests in *intention*, only, it is not indictable.

A conspiracy must, from its nature, be by two persons, or more ; one man alone cannot be tried and convicted of it, unless he be indicted for conspiring with other persons to the jurors unknown ; (9) or unless he be charged with having conspired with others who have not appeared, (10) or who are since dead. (11) And where two persons are indicted for conspiring together, and they are tried together, both must be convicted or both acquitted. (12)

Where A. B. and C. were charged in an indictment for having conspired together and with divers other persons to the jurors unknown, etc., and the jury found that A. had conspired with either B., or C., but they could not say which, and there was no evidence against any other persons than the three defendants, A. was held entitled to an acquittal. (13)

A count in an indictment charged eight defendants with one conspiracy to effect certain objects ; and a finding that three of them were guilty generally,

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(1) R. v. Hall, 1 F. & F. 33.
(2) R. v. Warburton, L. R., 1 C.C.R., 274 ; 40 L. J. (M. C.) 22.
(3) R. v. Orman, 14 Cox, 381.
(4) R. v. Kenrick, 5 Q. B. 49 ; Dan. & M. 208 ; 12 L. J. (M. C.) 135.
(5) R. v. Gompertz, 9 Q. B. 824.
(6) R. v. Fowle, 4 C. & P. 592.
(7) R. v. Thayer., 5 L. N. 162.
(8) R. v. Gill, 2 B. & Ald. 204 ; R, v, Seward, 1. A. & E. 70 ; 3 L. J. (M. C.) 103 ; R. v. Richardson, 1 M. & Rob. 402 :
(9) 1 Hawk c. 72, s. 8.
(10) R. v. Kinnersley, 1 Str. 193.
(11) R. v. Nicholls, 2 Str. 1227.
(12) R. v. Manning 12 Q. B. D. 241 ; 53 L. J. (M. C.) 85.
(13) R. v. Thompson, 16 Q. B., 832 ; 20 L. J. (M. C.) 183.

and that the other five were guilty of conspiracy to effect some of the objects, and not guilty as to the residue, was held bad and repugnant, the principle underlying the decision in that case being this, that where there are two or more persons charged with conspiracy in the same count, the count is a single and complete count, and cannot be separated into parts. (1)

With reference to the proof of a conspiracy, the commission of the offence is generally a matter of inference to be deduced from certain acts of the parties accused done in common between them in pursuance of an apparent criminal purpose (2) General evidence of the nature of the conspiracy may be gone into before adducing evidence to connect the different defendants with it. (3)

The acts and declarations of any of the conspirators in furtherance of the common design may be given in evidence against all of them. But before evidence of the acts of one conspirator can be given against the others, the existence of the conspiracy must be proved, and that the act in question was an act done in furtherance of the common design (4)

See, as to treasonable conspiracies, article 66, as to seditions conspiracies, articles 123, and 124, as to conspiracies to intimidate a legislature, article 70, as to conspiracies to bring false accusations, article 152, as to conspiracies to defile women, article 188, and as to conspiracies to murder, article 234; and see, also, article 527, *post*.

895. Cheating at play.—Every one is guilty of an indictable offence and liable to three years' imprisonment who, with intent to defraud any person, cheats in playing at any game, or in holding the stakes, or in betting on any event. R.S.C., c. 164, s. 80.

The Imperial statute 8 & 9, Vict. c. 109, s. 17, treats and punishes cheating at play as an obtaining by false pretences.

Where the offence is committed by two or more persons, and there is any doubt whether the facts are such as to bring the case within this article, a count should be added charging a conspiracy to cheat or a conspiracy to defraud.

As to gaming houses, betting houses, etc., see articles 196, 197 and 199, p.p. 117, 118 and 121, *ante*; and as to gambling in public conveyances, poolselling, and lotteries see articles 203, 204, and 205, p.p. 122 and 123, *ante*

896. Witchcraft, Fortune-Telling &c.—Every one is guilty of an indictable offence and liable to one year's imprisonment who pretends to exercise or use any kind of witchcraft, sorcery, enchantment or conjuration, or undertakes to tell fortunes, or 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.

The English Commissionners have opposite to this section a marginal note referring to 9 Geo. 2, c. 5, s. 4.

It is not long since the *Montreal Star* had the following article on the law relating to fortune-telling:

"Toronto lawyers are at present considering the question as to whether fortune-telling is an indictable offence. A diligent search into the precedents has

(1) O'Connell v R. 11 Cl. & J. 155; See R. v. Manning, *supra*.
(2) R v. Brisac, 4 East. 171.
(3) R. v. Hammond, 2 Esp. 718.
(4) R. v. Shellard, 9 C & P. 277; R. v. Blake, 6 Q. B. 126; 13 L. J. (M. C.) 131; Arch. Cr. Pl. & Ev. 21 Ed. 1106.

resulted in the disinterment of an English statute which affixed the death penalty to the committal of any such act. When we remember that a similar heroic treatment was applied in the case of sheep stealing, we are inclined to look for authority elsewhere than in obsolete statutes. Probably when the diligent investigators return to the light of the present day, after their explorations in the catacombs of precedent, they will perceive that obtaining money or goods under pretext of foretelling is punishable at common law, as presumably so doing under false pretences. This principle is plainly recognized by the Vagrant Act, which was hardly more than a consolidation of the common law on the subject, with a view to its presentment in a clearly-defined form. By this act all 'rogues and vagabonds' are considered as beggars, and are punishable under the statute as such. 'Rogues and vagabonds' comprehend all exposers of wounds, loiterers and fortunetellers. If it is advisable to suppress this practice, the foregoing enactment seems better calculated to subserve the interests of justice than the revival of the old statutes against witchcraft, against which both humanity and enlightenment revolt."

There is no doubt that the old English statutes treated the offence of witchcraft or sorcery with the greatest severity, the crime being ranked in the same class with heresy and those found guilty of practicing being consigned to the flames. In the reign of Henry VIII a statute was passed enacting, that all witchcraft and sorcery should be deemed felony, without benefit of clergy, which punishment, in the reign of James I, was awarded to any one invoking any evil spirit, or consulting, covenanting with, *entertaining*, employing, *feeding* or *rewarding* any such spirit, or exhuming dead bodies to be used in any witchcraft, sorcery, charm or enchantment, or killing or hunting any person by such infernal arts. And if any person should attempt by sorcery to discover hidden treasures, or to restore stolen goods, or to provoke unlawful love, or to hurt any man or beast, though not consummated, he should suffer imprisonment and the pillory for the first offence, and death for the second.

Under these and similar acts many poor wretches were sacrificed to the prejudices of their neighbors, and their own illusions, not a few having confessed the fact at the gallows.

By the statute of Geo. II, above referred to, the old acts were repealed, and the punishment was made one year's imprisonment and the pillory for pretending to exercise witchcraft or sorcery; or to tell or pretend to tell fortunes or discover stolen goods by skill in the occult sciences. (l)

PART XXIX.

ROBBERY AND EXTORTION.

397. Robbery.—Robbery is theft accompanied with violence or threats of violence to any person or property used to extort the property stolen, or to prevent or overcome resistance to its being stolen.

398. Every one is guilty of an indictable offence and liable to imprisonment for life and to be whipped who—

(*a*) robs any person and at the time of, or immediately before, or

(l) 2 Russ. Cr. 3 Ed. 316.

immediately after such robbery wounds, beats, strikes, or uses personal violence to such person ; or

(*b.*) being together with any other person or persons robs, or assaults with intent to rob, any person ; or

(*c.*) being armed with an offensive weapon or instrument robs, or assaults with intent to rob, any person. R.S.C., c. 164, s. 34.

399. Every one who commits robbery is guilty of an indictable offence and liable to fourteen years' imprisonment. R.S.C., c. 164, s. 32.

400. Every one who assaults any person with intent to rob him is guilty of an indictable offence and liable to three years' imprisonment. R.S.C., c. 164, s. 33.

Robbery is a stealing from the person aggravated by circumstances either of actual force and violence or of threats of violence ; a threat of violence being looked upon by the law as constructive violence. (1)

When robbery is committed in an open street, road, or square it is called highway robbery.

If there be any actual wounding or beating of the person robbed, it will be an *aggravated* robbery, punishable under article 398 ; if not, it will be a robbery, punishable under article 399. If the complete offence be not proved the jury may, according to the actual facts, find a verdict of guilty of an attempt (See article 711 *post*), or of an assault with intent to rob, or of stealing from the person, or of a common assault, etc. (See article 713, *post.*)

The difference between robbery and stealing from the person is that the former is open and violent, while the latter may be and generally is done clandestinely. In robbery, force is a necessary ingredient ; in simple stealing from the person, it is not. For instance, merely snatching property from a person, unawares and running off with it, is not robbery. The rule appears to be well established that no such sudden taking or snatching is sufficient to constitute robbery, unless at the same time some injury be done to the person, or there be a previous struggle for the possession of the property, or some violence, or threats of violence, used to obtain it. (2)

Thus, where a boy was carrying a bundle along the street in his hand, after it was dark, and the prisoner ran past him, and snatched it suddenly away, it was holden that the act was not done with the degree of force and terror necessary to constitute robbery. (3) And the same was holden in a case where it appeared that as two little boys were carrying a parcel of cloth to one of the inns at Bath, for the purpose of its being carried by a stage-coach to London, the prisoner came up suddenly, snatched the cloth from the head of one of them, and ran off with it. (4) The same doctrine has been held in three other cases ; in one of which the hat and wig of a gentleman were snatched from his head in the street ; (5) in another, an umbrella was snatched suddenly out of the hand of a woman, as she was walking along the street ; (6) and in a third, a watch was jerked, with considerable force, out of a watch-pocket. (7)

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(1) Donolly's case, 1 Leach, 196, 197.

(2) Reg. v. Baker, 1 Leach 290 ; R. v. Walls, 2 C. & K. 214 ; R. v. Moore, 1 Leach, C. C. 325 ; Reg. v. Walton, L. & C. 288 ; 4 Bl. Com. 243 ; R. v. Macauley, 1 Leach, 287. R. v. Steward, 2 East, P. C. 702.

(3) R. v. Macauley, *supra.*

(4) R. v. Robins, 1 Leach 290.

(5) R. v. Steward, *supra.*

(6) R. v. Horner, 5 East, P. C. 703.

(7) R. v. Gnosil, 1 C. & P. 304.

In this last case A. had caught hold of B's watch chain, and had jerked his watch from his pocket, with considerable force, after which a scuffle ensued, and A. was secured. Garrow, B. held that, the force used in jerking and obtaining the watch did not make the offence amount to robbery,—but only stealing from the person,—and that, the subsequent scuffle, and the force then used, did not alter the original offence; for the violence necessary to constitute robbery must be either immediately before or at the time of the stealing, and not after it. The learned judge said: "The mere act of taking being forcible will not make this offence highway robbery; to constitute the crime of highway robbery the force used must be either before or at the time of the taking, and must be of such a nature as to show that it was intended to overpower the party robbed, and prevent his resisting, and not merely to get possession of the property stolen; thus, if a man, walking after a woman in the street, were by violence to pull her shawl from her shoulders, though he might use considerable violence, it would not, in my opinion, be highway robbery, because the violence was not for the purpose of overpowering the party robbed, but only to get possession of the property."

If, however, any injury be done to the person, or, if there be, by the person stolen from, any struggle to keep possession of the property, before it is taken from him, there will be a sufficient actual violence. Thus in a case, where, while a lady was stepping into her carriage, the prisoner snatched at her diamond ear-ring, and separated it from her ear by tearing her ear entirely through; but there was no proof of the ear-ring ever having been seen in his hand, and, upon the lady's arrival at home, it was found amongst the curls of her hair; the judges, upon a case being submitted for their consideration, were all of opinion that it was robbery although the prisoner must have only had the ear ring in his possession for a moment, and could not retain but probably lost it, in the same instant. (1)

So, where the prisoner had torn some hair from a lady's head in snatching a heavy diamond pin from it, the pin having a corkscrew stalk, and being twisted very much in her hair, which was closely frizzed and strongly craped, it was held to be robbery. (2)

Where A. laid hold of the seals and chain of B's watch and pulled the watch out of the fob, but the watch being secured by a steel chain which went round B's neck, A. could not take it until, by pulling with two or three jerks, he broke the chain and then ran off with the watch, it was held by the judges upon a case reserved that this was robbery, as A. did not get the watch at once but had to overcome the resistance made by the steel chain, and used actual force for that purpose. (3)

Where it appeared that the prisoner had snatched at a sword while it was hanging at a gentleman's side, and that the latter perceiving him laid tight hold of the scabbard, upon which there ensued between them a struggle, in which the prisoner got possession of the sword, and took it away, the court held that this was robbery. (4)

A. ran against B., for the purpose of diverting his attention while he picked his pocket. Held that the force used was sufficient to make the stealing robbery, such force having been used with that intent. (5)

Even where the violence is used for a different purpose than that of obtaining the property of the person assaulted; yet, if property be obtained by it, the offence will, under some circumstances at least, amount to robbery; as where money was offered to a party endeavouring to commit a rape, and taken by him. Blackham assaulted a woman with intent to ravish her, and she, without

(1) R. v. Lapier, 1 Leach, 320.
(2) R. v. Moore, 1 Leach, 335.
(3) R. v. Mason, R. & R. 419.
(4) R. v. Davies, 2 East, P. C. 709.
(5) Anon. 1 Lew. 300.

any demand from him, offered him money to desist, which money he took and put into his pocket, but continued to treat the woman with violence, in order to effect his original purpose, until he was interrupted; and this was holden to be a robbery by a considerable majority of the judges; on the ground that the woman, from the violence and terror occasioned by the prisoner's behaviour, and to redeem her chastity, offered the money, which it was clear she would not have given voluntarily; and that the prisoner, by taking it, derived an advantage to himself from his felonious conduct, though his original intent was to commit a rape. (1)

It is not necessary that the thing when taken should be actually on the owner's person. It will be sufficient if by means of violence or threats of violence it be taken in his presence. (2)

Therefore, if A., upon being assaulted by a thief, throws his purse or cloak into a bush, and the thief takes it up and carries it away; or if, while A. is flying from the thief, he lets fall his hat, and the thief takes it up and carries it away, such taking being done in the presence of A. will be sufficient (3). So it has been said, that if a man's servant be robbed of his master's goods in the sight of his master, this shall be taken for a robbery of the master (4). So, if the thief having first assaulted A., takes away his horse standing by him; or, having threatened and put him in fear, drives his cattle, in his presence, out of his pasture, he may be properly said to take such property from the person of A., for he takes it openly and before his face while under his immediate and personal care and protection. (5)

Where, on an indictment for robbery, it appeared that the prosecutor gave his bundle to his brother to carry for him, and while they were going along the road the prisoners assaulted the prosecutor, upon which his brother laid down the bundle in the road, and ran to his assistance, and one of the prisoners then ran away with the bundle; Vaughan, B., intimated an opinion that under these circumstances the indictment was not sustainable, as the bundle was in the possession of another person at the time when the assault was committed. Highway robbery was a felonious taking of the property of another by violence against his will, either from his person or in his presence; the bundle in this case was not in the prosecutor's possession. If these persons intended to take the bundle why did they assault the prosecutor, and not the person who had it? (6) The prisoners were convicted of simple larceny; but if, when the attack was commenced, the bundle had been in the prosecutor's own possession, and he, instead of his brother, had thrown it down, and the prisoners had picked it up, it would surely have been held to be robbery.

It is not necessary that after being taken the property should continue in the possession of the thief. Thus, where a robber took a purse of money from a gentleman, and returned it to him immediately, saying. "If you value your purse, you will please to take it back, and give me the contents of it;" but was apprehended and secured before the gentleman had time to give him the contents of the purse; the court held that there was *sufficient taking* to complete the offence, although the prisoner's possession continued only for an instant. (7)

If the property be once taken, the offence will not be purged by the robber delivering it back to the owner.

For instance, A. requires B. to deliver his purse, and he delivers it accordingly when A., finding only two shillings in it, gives it to him again This is a *taking* by robbery. (8)

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(1) R. v. Blackham, 2 East. P. C. 711.
(2) 1 Hale, 533; Rex. v. Francis, 2 Str. 1015.
(3) 3 Inst. 68.
(4) Rex. v. Wright, Style, 156
(5) 1 Hawk. P. C., c. 34, s. 6; 4 Bl. Com. 243.
(6) Rex. v. Fallows, 5 C. & P. 508.
(7) R. v. Peat, 1 Leach 228; 2 East, P. C. 557; see, also R. v. Lapier, *supra.*
(8) 1 Hale 533; R. v. Peat, 1 Leach 228; 2 East P. C. 557.

The taking must be against the will of the person robbed, or, rather, he must not be a voluntary party to the transaction; and therefore where the person from whom the property was taken concerted and connived at the robbery and got one of his confederates to procure two strangers to commit it, for the purpose of getting a reward upon the apprehension and conviction of the strangers, the judges held that it was not a robbery, because the property was not taken against the party's will. (1)

The taking, in robbery, as in all other cases of theft must be *animo furandi*; and therefore if a person, under a *bonâ fide* impression that the property is his own, obtain it by threats, it is a trespass and it may be an assault but not a robbery. Therefore, where A owed B money and B violently assaulted A and forced him by that means to then and there pay him the debt, it was held that there was no felonious intent and no robbery. (2)

Although it is clear that, if a person by force or threats compel another to give him goods and by the pretence of payment oblige him to take less than the value, it is robbery, (3) it is doubtful whether it would be robbery for a man by force or threats, to compel another to give him goods which he has to sell, and in return give him money amounting to the full value of the goods. (4)

So that where a traveller met a fisherman with fish, who refused to sell him any, and he by force and putting in fear took away some of his fish, and threw him money much above the value of it, judgment was respited, because of the doubt whether the intent were felonious on account of the money given. (5)

Upon an indictment for robbing A of three wires and a pheasant, it appeared that B had set the wires in one of which the pheasant was caught, and A a gamekeeper of the manor where the wires were set, took the wires and the pheasant into his possession. B came up soon afterwards and said to A, "Have you got my wires?" A replied that he had, and that he had also a pheasant that was caught in them. B then asked A to give him the pheasant and wires, which A refused to do; whereupon B lifted up a large stick and threatened to beat out A's brains, if he did not give them up. A, fearing personal violence, then gave them up. Vaughan B., in putting the case to the jury, said, "If the prisoner demanded the wires under the honest impression that he had a right to them, though he might be liable for a trespass in setting them, it would not be a robbery. The game-keeper had a right to take them, and when so taken they never could have been recovered from him by the prisoner; yet, still, if the prisoner acted under the honest belief that the property in them continued in himself, I think it is not a robbery. If, however, he used it merely as a pretence, it would be robbery. The question for the jury is, whether the prisoner did honestly believe he had a property in the snares and pheasant or not. (6)

It seems that where violence is used and the prosecutor forced to deliver his property under circumstances calculated to excite fear, the offence will not the less amount to robbery on account of the thief having had recourse to some colorable or specious pretence, in order the better to effect his purpose. For instance, if a man, with a sword drawn, asks alms of a person who gives them to him through mistrust and apprehension of violence, it is as much robbery as if he had demanded the money in the ordinary way. (7) And, where the defendant took goods from the prosecutrix of the value of eight shillings and by force and threats compelled her to take one shilling as a pretence of payment for them, it was held that this was robbery. (8)

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(1) R. v. McDaniel, Fost. 121, 128.
(2) See R. v. Hemmings, 4 F. & F. 50.
(3) R. v. Simons, *post*.
(4) 1 Hawk, P. C. c. 34 s. 14; Bl. Com. 224.
(5) The fisherman's case, 2 East P. C. 661, 662.
(6) R. v. Hale 3 C. & P. 409; 1 Russ. Cr. 3 Ed. 872.
(7) 4 Bl. Com. 242.
(8) R. v. Simons, 2 East, P. C. 712.

One Hall at the head of a riotous mob stopped on the highway a cart laden with cheeses and insisted upon seizing them, for want of a permit. This was a mere pretence, no permit being necessary. After some altercation, Hall induced the owner, one Merriman, to go with him before a magistrate; and, while they were absent, the mob, by preconcerted arrangement with Hall, pillaged the cart. On an action against the hundred, upon the statutes of hue and cry, it was objected that this was no robbery, because there was no force; but Hewitt, J., overruled the objection, and left the case to the jury who were of opinion that Hall's conduct in insisting upon seizing the cheese for want of a permit was a mere pretence, so as to defraud Merriman and they found that the offence was robbery. This finding was afterwards confirmed by the Court of King's Bench on a motion for new trial; the opinion that the case amounted to a robbery being based upon the consideration that the first seizure of the cart and goods by Hall, being by violence, and while the owner was present, constituted the offence one of robbery. (1)

In another case, also, the offence was held to be robbery, though the violence made use of was under the colour and pretence of a legal proceeding. The prosecutrix was brought to a police office by the prisoner, into whose custody she had been delivered by a headborough, who had taken her up under a warrant, upon a charge of having committed an assault upon a woman who lodged in her house. The magistrate having examined the complaint, ordered her to find bail; but at the same time advised the parties to make the matter up, and become good friends. The magistrate then left the office, and the prisoner, who was an under-servant to the turnkey of the New Prison, Clerkenwell, and acted occasionally as a runner to the police office, but had no regular appointment either as a constable or other peace officer, nor had in particular any order to carry the prosecutrix to prison, took her to a public house, where her husband was waiting expecting her to be discharged. When her husband found that the matter was not settled, he requested the prisoner to wait a short time, while he went to procure bail, and immediately left the house. As soon as he was gone, the prisoner began to treat the prosecutrix very ill, locked her up for some time in a stinking place, and then brought her out and threatened to carry her immediately to prison. She was terrified, and implored him to wait till her husband returned; and offered to give him half-a-crown, if he would comply with her request; but he refused, and immediately handcuffed her to a man whom he had in custody on a charge of assault. The prisoner then kicked her, thus handcuffed before him; and shoved her and the man into a coach, which he ordered to drive to the New Prison. He then came into the coach; and, almost immediately upon the coach setting off, put a handkerchief to the mouth of the prosecutrix, and forcibly took from her a shilling, he saying at the same time, "This will buy us a glass a-piece" He then asked her if she had any more money, said that he was sorry for her children, and that if she had as much money as would pay for the coach, she should not go to prison. She said she had no more money; but the man who was handcuffed to her rattled the handcuff against the side of her pocket, and the prisoner put his hand into her pocket, and took out three shillings. He then continued to promise to carry her back, but did not give any directions to the coachman to change his course In about ten minutes after taking the three shillings, he stopped the coach at a public house, called for some gin, drank some himself, gave the coachman a glass, and offered the prosecutrix a glass, which she several times refused, but at last drank upon his insisting she should do so and again promising her that she should not be detained. He gave in payment for the gin the shilling which he first took from her, and got sixpence in change. As the prisoner had promised to carry her back, the prosecutrix made no complaint at the public house, but said, that if the prisoner would carry her back he might keep the other three shillings which he had taken from her. The prisoner, however, proceeded with her to the New Prison. He paid a shilling, or one shilling and sixpence for the coach; but returned no part of the money to the prosecutrix. Nares, J., who tried the prisoner, said, that in order to commit the crime of robbery, it was not necessary

(1) Merriman v. The Hundred of Chippenham, 2 East P. C. 709.

that the violence used to obtain the property should be by the common and usual modes of putting a pistol to the head, or a dagger to the breast; and that a violence, though used under a colourable and specious pretence of law, or of doing justice, was sufficient, if the real intention was to rob; and he left the case to the jury, with a direction that if they thought the prisoner had originally, when he forced the prosecutrix into the coach, a felonious intent of taking her money, and that he made use of the violence of the handcuffs as a means to prevent her making resistance, and that he took the money with a felonious intent, they should find him guilty.

The jury found the prisoner guilty; and upon the case being referred to twelve judges they were unanimously of opinion that, as the jury, by their verdict, found that the prisoner had an original intention to take the money, and had made use of violence, though under the sanction and pretence of law, for the purpose of obtaining it, the offence was clearly, a robbery. (1)

When the robbery is effected by means of threats, the threats will be sufficient, if they were such, or if the circumstances proved are such as to be *calculated or likely* to create a fear of some violence to the prosecutor's person or property, or an apprehension that it would be dangerous or unsafe for him to refuse to accede to the robber's demands, or useless to attempt to withhold the property which he is thus induced to part with. (2)

Where, therefore, on an indictment for robbery, it appeared that the prisoners and their companions hung around the prosecutor's person in the streets of Manchester, so as to render all attempt at resistance hazardous, if not vain, and rifled him of his watch and money, but it did not appear that any force or menace was used, it was held that this was a robbery; for if several persons so surround another, as to take away the power of resistance, that is force. (3)

A stage coach having frequently been robbed on a particular road, J. N., on one occasion took a little money and a pistol in his pocket for the purpose of apprehending the highway robber; and went into the coach as a passenger. The highwayman, as usual, met the coach, presented a pistol and demanded money of the passengers; J. N. delivered up his money, but, immediately afterwards, jumped out of the coach, and, with the assistance of others, secured the robber. *Held* to be robbery. (4)

The threats of violence should be before or at the time of the thing being taken, and therefore, if a man privately steal money from the person of another, and afterwards keep it by threats of violence, it will be no robbery, but stealing from the person. For instance, where a thief clandestinely stole a purse, and, on its being discovered in his possession, threatened vengeance against the party if he should dare to speak of it, and then rode away, it was held to be simple theft only, and not robbery, as the words of menace were used after the taking of the purse (5). If the purse had been obtained by means of the menace, the offence would have amounted to robbery.

There may, however, be cases of robbery in which the property is not obtained immediately upon the threat being made; but, in these cases, although there is not an immediate taking, in fact, there may be a taking, in law, sufficient to constitute a robbery. (6) It has been held, for instance, that, if thieves attack a man to rob him, and finding little or nothing about him, force him, by menace of death, to swear to fetch them money, which he does accordingly, and delivers it to them while the fear of the menace still continues upon him, and they receive it, this is a sufficient taking in law. (7) And if upon A. assaulting B.,

(1) R. v. Gascoigne, 2 East, P. C. 709.
(2) Fost. 128; 4 Bl. Com. 243, 244.
(3) Hughes' case, 1 Lew. 301.
(4) Fost. 129.
(5) Harman's case, 1 Hale, 534.
(6) 3 Inst 68: 1 Hale, 532
(7) 2 East P. C 714.

and bidding him to deliver his purse, B. refuse to do so, and then A. pray B. to give or lend him money, and B. does so accordingly, under the influence of fear, the taking by robbery will be complete. (1) For where the thief receives money, &c., by the delivery of the party, either while the party is under the terror of an actual assault, or afterwards while the fear of the menaces made use of by the thief continues upon him, such thief may, in the eye of the law, as correctly be said to take the property from the party, as if he had actually taken it out of his pocket. (2)

To obtain money by a mere threat to take a person before the police court for not taking and paying for goods pretended to be sold to her at a mock auction has been held not to amount to robbery. For instance, where the prisoners, assisted by other persons, got the prosecutrix into a house, under pretext of an auction being carried on there, forced her to bid for a lot of articles which was immediately knocked down to her, and then, upon her not producing the money to pay for it, threatened that she should be taken to Bow-street, and from thence to Newgate, and be imprisoned till she could raise the money; and after these threats had been used, a pretended constable was introduced, who said to the prosecutrix, "Unless you give me a shilling you must go with me," upon which she was induced to give the pretended constable a shilling, as a means of obtaining her liberty, and to avoid being carried to Bow-street and to Newgate, and not out of fear or apprehension of any other personal force or violence; the judges, after argument, and a minute discussion of the circumstances of the case, were of opinion that they were not sufficient to constitute the crime of robbery. They thought that the threat used of taking the prosecutrix to Bow-street, and from thence to Newgate, was only a threat to put her into the hands of the law, which she might have known would have taken her under its protection and set her free, as she had done no wrong; that an innocent person need not in such a situation be apprehensive of danger; and, therefore, that the terror arising from such a source was not sufficient to induce an individual to part with property, so as to amount to robbery. (3)

A similar state of facts would, no doubt, be sufficient to sustain an indictment for conspiracy to defraud, or an indictment under article 404, *post*, for demanding with menaces, with intent to steal.

Where the defendant decoyed the prosecutor into a house and chained him down to a seat and there compelled him to write orders for the payment of money and for the delivery of deeds, the paper on which he wrote remaining in his hands half an hour but he was chained all the time, it was held (before the 24 and 25 Vict., c. 96, sec. 48), that it was not an assault with intent to rob. (4)

Such cases as this are now covered by the Imperial statute; and they come under our article 402, *post*.

It seems that the fear of violence to the person of a child of the party from whom property is demanded will fall within the same consideration as if the fear were of violence to the person of the party himself; and so where the case was put of a man taking another's child and threatening to destroy him, unless the other would give him money, Hotham, B. said he had no doubt that this would be robbery (5). And, Eyre, C. J. expressed the same opinion in the case of R. v. Reane. In that case James Reane was indicted for a highway robbery, and David Watkins was charged, as an accessory before the fact. The prosecutor on the 12th of May, 1794, met the prisoner, Reane, in the street. He was an entire stranger to the prosecutor; but he asked for money, and, upon the prosecutor's refusing to give him any, went away muttering expressions of anger. Next day he again met the prosecutor, and repeated his request for money; and, on being refused said, "You shall be the worse for it." On the 23rd of May, he again accosted the prosecutor, and told him that he had taken

(1) 1 Hale 533.
(2) 2 East P. C. 711, 714.
(3) R. v. Knewland, 2 Leach, 721; R. v. Wood, 2 East, P. C 732. See, also, article 406, *post*.
(4) R. v. Edwards, 6 C. & P. 521.
(5) R. v. Donolly, 2 East, P. C. 715, 718.

indecent liberties with him in the park, and that it had been seen and could be proved by a third person. The prosecutor, with a violent exclamation, asked him what he meant; to which he made no reply, but walked away. On the next day the prosecutor received a letter from him containing similar charges; and having consulted with a friend, he made an appointment with and met Reane, who said, that if the prosecutor did not give him money he could prove his indecencies with him as a third person had seen it; upon which the other prisoner, Watkins, said: "Yes, I saw you." The prosecutor exclaimed, that it was a horrid abominable falsity.

On the following morning Reane met the prosecutor, and told him he must have twenty pounds in cash, and a bond for fifty pounds a-year; upon which the prosecutor, in pursuance of a plan previously concerted with his friend, told Reane that if he would wait a few days he would bring him the money and the bond. The prosecutor afterwards gave the bond together with nineteen guineas and a shilling, to Reane, who carried both bond and money away with him, saying he would give the prosecutor no further trouble. It was objected for the prisoners that this proof was defective; as, in order to constitute robbery there must be a violence, or fear of danger, as to the person or character, existing when the property is parted with; but the case was left to the jury, who found the prisoners guilty; upon which the opinion of the twelve judges was taken. Eyre, C. J., observed, "That it would be going a step further than any of the cases to hold this to be robbery. That the principle of robbery was violence; and where the money was delivered through fear, that was constructive violence. That the principle he had acted upon, in such cases, was to leave the question to the jury, whether the defendant had, by certain circumstances, impressed such a terror on the prosecutor as to render him incapable of resisting the demand. Therefore, when the prosecutor swore as he had done that he was under no apprehension at the time, but gave his money only to convict the prisoners, he negatived the robbery. A man might be said to take by violence who deprived the other of the power of resistance, by whatever means he did it. And he saw no sensible distinction between a personal violence to the party himself, and the case put by one of the judges of a man holding another's child over a river, and threatening to throw it in unless he gave him money." The judges held that the conviction was wrong; as there was no violence either actual or constructive, at the time the prosecutor parted with the money. (1) Cases like Reane's are covered by article 405, *post*.

The cases in which the offence of robbery has been committed by threats or fear of injury to the property of the party are principally those in which the fear excited was of the probable outrages of a mob.

A., the ringleader in some riots amongst the tinners of Cornwall went with about seventy others to the house of B, and said they would have from him the same as they had got from his neighbors, namely a guinea, or they would tear his mow of corn and level his house. B gave them a crown to appease them, when A swore that he would have five shillings more, which B, being terrified, gave him. They then opened a cask of cider by force, drank part of it, and ate B's bread and cheese; and A carried away a piece. This was held to be robbery. (2)

If a mob go to a person's house, and civilly ask and advise him to give them something, if this be not done *bonâ fide*, but as a mere mode of robbing him, the offence is robbery; and evidence of demands of money, made by the same mob on the same day, at other houses, is admissible, to show that this was not done *bonâ fide*. On an indictment for robbery, it appeared that the prisoners went with a mob to the prosecutor's house, and that one of the mob very civilly, and, as the prosecutor then thought, with a good intention, advised him to give them something to get rid of them, and to prevent mischief, and that in consequence of this, he gave them the money stated in the indictment. To show that this was not *bonâ fide* advice, but in reality a mere mode of robbing the prosecutor, it was proposed to give evidence of other demands of money made

(1) R. v. Reane, 2 East, P. C. 735, 736.
(2) R. v. Simons, 2 East, P. C. 731.

by the same mob at other houses, at different times of the same day, when some of the prisoners were present; it was objected that the fact, that money had been demanded at other places would be no proof of any demand made on the prosecutor; and that this was, in effect, trying the prisoners upon other charges which they could not be prepared to meet. But it was held, by Parke, J., (after consulting Vaughan, B., and Alderson, J.,), that what was done before and after the particular transaction at the prosecutor's house, but in the course of the same day, and when the prisoners were present, might be given in evidence. (1)

In Spencer's case, corn was taken from the prosecutor by the prisoner, and a mob who accompanied him, compelling the prosecutor to sell it under its value, by a threat that if he would not sell it at the sum offered, it should be taken away. The prosecutor had corn belonging to other persons in his possession when the prisoner came to him, together with a great mob marching in military order. One of the mob said, that if he would not sell they were going to take it away; and the prisoner said that they would give thirty shillings a load, and if he would not take that, they would take the corn away; upon which the prosecutor sold corn for thirty shillings which was worth thirty-eight shillings. This was ruled to be robbery, and the prisoner was convicted, and executed. (2)

In a case arising out of the London riots in 1780, the prosecutor swore at the trial that the prisoner and another man entered into his dwelling-house; and, upon being asked by him what they wanted, the prisoner, having a drawn sword in his hand, said with an oath, "Put one shilling into my hat, or I have a party that can destroy your house presently;" upon which he gave him a shilling. It was also sworn by another witness, that the prisoner also said, that if the prosecutor "would keep the blood within his mouth, he must give the shilling." This offence was also holden to be robbery. (3)

In another case against the London rioters of 1780, it appeared that a boy with a cockade in his hat knocked violently at the prosecutor's door, who thereupon opened it, when the boy said to him, "God bless your honour, remember the poor mob." The prosecutor told him to go along; on which he said, "Then I will go and fetch my captain," and went away; but soon afterwards the mob, to the number of a hundred, armed with sticks, and such other things as they had been able to procure, came, headed by the prisoner, who was on horseback, and whose horse was led by the same boy. On their coming up, the by-standers said, "You must give them money," and the boy said, "Now, I have brought my captain;" and some of the mob said, "God bless this gentleman, he is always generous." The prosecutor then said to the prisoner, "How much?" to which the prisoner answered, "Half a crown, sir;" upon which the prosecutor, who had before only intended to give a shilling, gave the prisoner half-a-crown. The mob then gave three cheers, and went to the next house. This was holden to be robbery (4)

During some riots in Birmingham A threatened B. that unless he would give him a certain sum of money he should return with the mob and destroy his house. B., under the impression of this threat gave A. the money. *Held* by the judges to be robbery. (5)

401. Stopping the mail.—Every one is guilty of an indictable offence and liable to imprisonment for life, or for any term not less than five years, who stops a mail with intent to rob or search the same. R.S.C., c. 35, s. 81.

See article 4, *ante*, p. 7, for definition of "mail."

The property in any mailable matter may be laid in the Postmaster General, (See article 624, *post*.)

(1) R. v. Winkworth, 4 C. & P. 444.
(2) R. v. Spencer, 2 East P. C. 712, 713.
(3) R. v. Brown, 2 East P. C 731.
(4) R. v. Taplin, 2 East P. C. 712.
(5) R. v. Astley, 2 East P. C. 720.

As to receiving stolen post letters, etc. See article 315 *ante*, and as to stealing post letter bags, post letters and other mailable matter, *etc.*, see articles 326, 327, and 328, *ante*.

402. Compelling Execution of Documents by force.—Every one is guilty of an indictable offence and liable to imprisonment for life who, with intent to defraud, or injure, by unlawful violence to, or restraint of the person of another, or by the threat that either the offender or any other person will employ such violence or restraint, unlawfully compels any person to execute, make, accept, endorse, alter or destroy the whole or any part of any valuable security, or to write, impress or affix any name or seal upon any paper or parchment, in order that it may be afterwards made or converted into or used or dealt with as a valuable security. R.S.C., c. 173, s. 5.

The provision contained in this article, 402, meets such cases as R. v. Phipoe, in which it was held that where one person compelled another, by threats, to sign a promissory note it was no robbery, the note being of no value to the party signing it. (1)

Under sec. 48 of 24 & 25 Vict. c. 96, (which is to the same effect as the above article 402), the defendants in the case of R. v. John, were indicted for having, by threats of violence and restraint, induced the prosecutor to write and sign the following document:—

"London, July 19th. 1875.

"I hereby agree to pay you £100 sterling on the 27th inst. to prevent any action against me."

Held that the document was a valuable security. (2)

See articles 405, and 406 *post*.

403. Threatening Letters.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who sends, delivers or utters, or directly or indirectly *causes to be received*, knowing the contents thereof, any letter or writing *demanding* of any person with menaces, and without any reasonable or probable cause, any property, chattel, money, valuable security or other valuable thing. R.S.C., c. 173, s. 1.

See article 3 (*aa*), (*ee*) for definitions of "valuable security" and "writing," p.p. 6 and 7, *ante*.

Article 403 is to the same effect as the Imperial statute, 24 & 25 Vict. c. 96, s. 44. Under this article it will be sufficient evidence of the sending or causing to be received to prove that the defendant placed the letter in a place where he knew the prosecutor would come, and that it thus reached him, or that it was there picked up by another person and by him delivered to the prosecutor; (3) or that the letter is in the defendant's handwriting and came to the prosecutor through the post. (4)

Where the prosecutor, having received such a letter, traced it to a woman who was in the habit of going errands for prisoners in Newgate, and she proved

(1) R. v. Phipoe, 2 Leach, 673: 2 East P. C. 599. See R. v. Edwards, 6 C. & P. 515, 521; R. v. Smith, 2 Den. 449; 21 L. J. (M. C.) 111. Arch. Cr. Pl. & Ev. 21 Ed 479.

(2) R. v. John, 13 Cox. 100, Brett, J.

(3) R. v. Lloyd, 2 East, P. C. 1122; R. v. Wagstaff, R. & R. 308.

(4) R. v. Hemming 2 East, P. C. 1116: R. v. Jepson, 2 East, P. C. 1115.

that she received it from the defendant then a prisoner in Newgate with instructions to post it, and the post office employee proved that the letter in question was brought to the office by the woman, and forwarded in the regular course, the evidence was held sufficient not only of the sending by the defendant but also that he knew its contents. (1) 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. (2) And the leaving of a letter, directed to A., near A's house, with the intention that it should not only reach A. but B. also, was held to be a sending of it to B., by whom it was afterwards seen. (3)

Where the letter contained a request only, but intimated that if it were not complied with, the writer would publish a certain libel then in his possession accusing the prosecutor of murder, it was held to amount to a demand. (4)

As to extortion by threatening to publish a libel, see article 300, *ante*.

The demand must be with menaces and without reasonable or probable cause, and it will be for the jury to consider whether the letter does expressly or impliedly contain a demand of this description. The words "without any reasonable or probable cause" apply to the demand for money, and not to the threatened accusation to be made against the prosecutor; and therefore it is immaterial in point of law whether the threatened accusation be true or not. (5)

An anonymous letter intimating that some persons had conspired to burn or otherwise destroy the prosecutor's property, and offering to make a disclosure, if £30 were placed for the writer in a certain spot, was held not to be within the 7 & 8 Geo. 4, c. 29, s. 8, as it did not contain any menace, although its contents might create some apprehension in the owner's mind. The indictment charged the prisoner with sending the following letter to Mr. Young, demanding money, with menaces :—

"SIR,

"As you are a gentleman and highly respected by all who know you, I think it my duty to inform you of a conspiracy. There is a few young men who have agreed among themselves to take from you personally a sum of money, or injure your property. I have overheard all the affair. I mean to say, your building property, in the manner they have planned this dreadful undertaking, would be a most serious loss. They have agreed to commence this upon an appointed time in the course of this winter, which would be a most dreadful sight. Sir, I could give every particular information how you may preserve your property and your person, and how to direct and secure the offenders. Sir, if you will lay me a purse of thirty sovereigns upon the garden edge, close to Mr. Tatler's garden gate, I will leave a letter in the place to inform you of the night this is to take place. I can also inform you how you could be sure to secure the offenders; but you must keep all this quite secret, and not make a talk of it, as it would come to their ears, and then they would put it off to another time. Sir, I hope you will not attempt to seize upon me, when I come to take up the money and lay down the note of information. Sir, you will find I am doing you a most serious favour. You will please excuse me in not describing my name, but I will make myself known the day after you have taken them, and be a witness against them. I shall come to lay down my letter on the 1st of December if I find the money. Sir, I am your unknown friend."

It appeared that the prisoner had written the letter, as a mere device to get the thirty sovereigns and leave the country. For the prosecution it was contended that the letter contained a sufficient demand of money, as the request was accompanied by a condition, namely, to discover persons going to do a certain act, and *Robinson's case* (6) was cited. And, with respect to the mena-

(1) R. v. Girdwood, 2 East, P. C. 1120; 1 Leach, 142.
(2) R. v. Paddle, R. & R. 484.
(3) R. v. Grimwade, 1 Den. 30; 1 C. & K. 592.
(4) R. v. Robinson, 2 Leach, 749; 2 East P. C. 1110.
(5) R. v. Hamilton, 1 C. & K. 212; R. v. Gardner, 1 C & P. 479.
(6) See R. v. Robinson, *ante*.

ces, to hold that the letter contained none, would be equivalent to holding that, whenever the menaces came from one person, and the letter from another, neither could be indicted; and, at all events, it was a question for the jury whether the letter did contain menaces. Bolland, B., then left it to the jury to say, whether the letter contained menaces, and they convicted the prisoner; but, upon a case reserved, the majority of the judges eight in number were of opinion that the conviction was wrong; but the other four judges (Tindall, C. J., Garrow, B, Park, J., and Bosanquet, J. thought the letter was one demanding money with menaces. (1)

In a later case, it was, however, decided that a very similar letter was a letter demanding money with menaces, within the same statute of Geo. 4; the letter being one written to a banker, stating that it was intended by a cracksman to burn his books, and cause the bank to stop, and that, if £250 were put in a certain place, the writer of the letter would prevent the mischief, but if the money were not put there it would happen. (2)

404. Demanding with intent to steal.—Every one is guilty of an indictable offence and liable to two years' imprisonment who, with menaces, demands from any person, either for himself or for any other person, anything capable of being stolen *with intent to steal it.*

This article is to the same effect as sec. 45 of 24 and 25 Vic., c. 96

In order to bring a case within this article, the demand must be such as would, if successful, amount to stealing; and the menace contemplated by the article must be of such a nature as to unsettle the mind of the person upon whom it operates, and to take away from his acts that element of voluntary action which alone constitutes consent. It must therefore be left to the jury to say whether the conduct of the prisoner is such as to have had that effect on the prosecutor. (3)

The gist of the offence is the demand itself accompanied by menaces and an intent to steal; and, therefore, if such a demand is successful it amounts to an actual theft.

Where a policeman, professing to act under legal authority, threatened, that, unless money were given to him he would imprison a person on a charge not amounting to an offence in law, and the person believing him gave him money, it was held that he might be indicted under the Imperial statute 24–25 Vict., c. 96, s. 45; although he might also have been indicted for stealing the money. (4)

As menaces are of two kinds,—by words or by gestures,—it seems that it is not necessary to prove an *express* demand *in words*, but that if the words or gestures of the defendant at the time were plainly indicative of what he required and tantamount in fact to a demand, though not in actual words, it would seem to be sufficient proof of the allegation, in the indictment, of a demand. (5)

405. Extortion by threats to accuse of a capital or infamous crime.—Every one is guilty of an indictable offence and liable to fourteen year's 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*

(1) R. v. Pickford, 4 C. & P. 227.
(2) R. v. Smith, 1 Den. 510; 2 C. & K. 882; 19 L. J. (M. C.) 80.
(3) R. v. Walton, L. & C. 288; 32 L. J. (M. C.) 79.
(4) R. v. Robertson, L. & C. 483; 34 L. J. (M. C.) 35.
(5) R. v. Jackson, 1 Leach, 269.

(i.) any offence punishable by law with death or imprisonment for seven years or more ;

(ii.) any assault with intent to commit a rape, or any attempt or endeavour to commit a rape, or any indecent assault ;

(iii.) carnally knowing or attempting to know any child so as to be punishable under this Act ;

(iv.) any infamous offence, that is to say buggery, an attempt or assault with intent to commit buggery, or any unnatural practice, or incest ;

(v.) counselling or procuring any person to commit any such infamous offence ; or

(*b.*) threatens that any person shall be so accused by any other person ; or

(*c.*) causes any person to receive a document containing such accusation or threat, knowing the contents thereof ;

(*d.*) by any of the means aforesaid compels or attempts to compel any person to execute, make, accept, endorse, alter or destroy the whole or any part of any valuable security, or to write, impress or affix any name or seal upon or to any paper or parchment, in order that it may be afterwards made or converted into or used or dealt with as a valuable security. R.S.C., c. 173, ss. 3, 4, 1 and 5.

The provisions of the Imperial law on the subjects of the above article 405 are contained in sections 46 and 47 of 24 and 25 Vict c. 96, which are as follows;

"Whosoever shall send, deliver or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing, accusing or threatening to accuse any other person of any crime punishable by law with death, or penal servitude for not less than seven years, or of any assault with intent to commit any rape, or of any attempt or endeavor to commit any rape, or of any infamous crime as hereinafter defined, with a view or intent, in any of such cases, to extort or gain, by means of such letter or writing, any property, chattel, money, valuable security or other valuable thing from any person, is guilty of felony, and being convicted thereof shall be liable at the discretion of the court, to be kept in penal servitude for life, or to be imprisoned [*etc*] ; and the abominable crime of buggery, committed either with mankind or with beast, and every assault with intent to commit the said abominable crime, and every attempt or endeavor to commit the said abominable crime, and every solicitation, persuasion, promise or threat offered or made to any person whereby to move or induce such person to commit or permit the said abominable crime, shall be deemed to be an infamous crime within the meaning of this Act : " (section 46)

" Whosoever shall accuse, or threaten to accuse, either the person to whom such accusation or threat shall be made or any other person, of any of the infamous or other crimes lastly hereinbefore mentioned, with the view or intent, in any of the cases last aforesaid, to extort or gain from such person so accused or threatened to be

accused, or from any other person, any property, chattel, money, valuable security or other valuable thing, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for life ; [*etc.*] (Section 47).

It will be seen that, under the provisions of the above article, 405, the accusation or threat to accuse may be either verbal or in the shape of a document ; and that under the English sections the accusation or threat may be either verbal or in the shape of a letter or writing ; and as both refer in effect, to the same offences there is very little difference between the English section and our article 405. But article 406, *post*, extends the above provisions so as to cover accusations or threats to accuse of any other offence.

It seems that the threat need not be a threat to accuse before a judicial tribunal ; but that a threat to make the accusation before a third party is sufficient (1). So that if A. with intent to extort money from B. were to threaten to accuse him, before his wife of *having* committed an infamous offence, it seems that this would make A. liable under the above article.

The article expressly states that it shall be immaterial whether the accusation be true or not ; and, therefore, it would be no defence that the prosecutor was guilty of the offence of which he was accused or threatened to be accused ; (2) for the gist of the crime is the accusing or threatening to accuse with intent to extort or gain anything.

The prosecutor's guilt or innocence of the crime imputed to him may, however, be material where the question arises as to whether, under the circumstances, the prisoner had an intention to extort money. (3)

If the prisoner's intent do not appear from the accusation or threat itself, it may be proved by circumstances from which the jury may fairly presume it ; as by subsequent expressions of the defendant. (4)

Proof that the prisoner went to the prosecutor, and threatened to accuse his son of an unnatural offence with a mare unless the prosecutor would buy the mare for £3, was held to sustain an indictment for threatening to accuse of an abominable crime, with intent thereby to extort money. (5)

As to threats to murder, see article 233, *ante* ; and as to threats to burn see article 487, *post*.

406. Extortion by Threats to Accuse of any other offence.—Every one is guilty of an indictable offence, and liable to imprisonment for seven years who—

(*a.*) with intent to extort or gain anything from any person accuses or threatens to accuse either that person or any other person of any offence other than those specified in the last section, *whether the person accused or threatened* with accusation *is guilty or not* of that offence : or

(*b.*) with such intent as aforesaid, threatens that any person shall be so accused by any person ; or

(*c.*) causes any person to receive a document containing such accusation or threat knowing the contents thereof ; or

(1) R. v. Robinson, 2 M. & Rob. 14.
(2) R. v Cracknell, 10 Cox, 408.
(3) R. v. Richards, 11 Cox, 43.
(4) R. v. Cain, 8 C. & P. 187.
(5) R. v. Redman, L. R., 1 C. C. R. 12 ; 35 L. J. (M. C.) 89.

(*d.*) by any of the means aforesaid, compels or attemps 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.

Articles 405 and 406 are to the same effect as sections 295 and 296 of the English Draft Code, except, that under the first of these two sections the punishment is penal servitude for life, (with one whipping in the case of a male offender under sixteen,) and seven years penal servitude, under the other section.

Upon section 296 of their Draft the English Commissioners have the following remark :—

" The provisions as to Robbery and Extortion re-enact the existing law, with the exception of section 296, which is new. At present a policeman or game keeper who levies blackmail under threats of accusing of larceny or poaching, is,—if criminally responsible at all,—only punishable with imprisonment and fine."

A obtained five shillings from B. by pretending to be a bailiff, and threatening to distrain. It was held that his guilt depended on the question whether or not he made the threat in such a way as to unsettle B's mind, and take away from his acts that element of free voluntary action which alone constitutes consent. (1)

A demand with menaces of money actually due is not a demand with intent to steal. (2)

PART XXX.

BURGLARY AND HOUSEBREAKING.

According to some of the more ancient authorities, burglary was the felonious breaking and entering of houses, or churches, or the walls or gates of a town.

Lord Coke gives as a reason for considering the breaking and entering of a church as a burglary, that the church is *domus mansionalis omnipotentis Dei.* (3)

But it has generally been considered as having reference to the breaking and entering of private houses, and in that sense it is described, as—*A breaking and entering the mansion-house of another in the night, with intent to commit some felony within the same, whether such felonious intent be executed or not.* (4)

The word *burglar* is supposed to have been introduced from Germany by the Saxons; and to be derived from the German, *burg*, a house, and *larron*, a thief: the latter word being from the Latin, *latro* (5) But Sir H. Spelman thinks that the word *burglaria* was brought here by the Normans, as he does not find it amongst the Saxons; and he says that *burglatores*, or *burgatores*, were so called, *quod dum alii per campos latrocinantur eminus, hi burgos pertinacius effrin-*

(1) R. v. Ogden, L. & C. 288.
(2) R. v. Johnson U. C. Q. B., 569.
(3) 3 Inst. 63.
(4) 4 Bl. Com. 224 ; 1 Hawk. P. C., c. 38, s. 1 ; 2 East, P. C. 484.
(5) Burns Just. Tit. *Burglary*, sec. 1.

gunt, et deprædantur. The crime, however appears to have been noticed in our earliest laws, in the common genus of offences denominated *Hamsecken*, and, by the ancient laws of Canute and of Henry I., to have been punished with death. (1)

Originally the circumstance of *time* does not seem to have been material; and the malignity of the offence was supposed to consist entirely in the invasion on the right of habitation, to which the laws of England have always shewn special regard.

The learned editor of Bacon's abridgement says that his researches had not enabled him to discover at what particular period *time* was first deemed essential to the offence, but that it must have been so settled before the reign of Edward VI. (2)

There is no material difference between the above description or definition of burglary and that contained in article 410, *post*. A verbal change, however is necessary, on account of the abolition of the distinction between felony and misdemeanor. The general definition of burglary, therefore, will now stand thus,—*A breaking and entering of a dwelling-house, by night with intent to commit an indictable offence therein.* Clause (*b*), of article 410, however, makes it burglary, also, to break out of a dwelling-house, by night, after having committed an indictable offence therein or after having entered it with intent to commit an indictable offence therein.

407. Meanings of terms.—In this part, the following words are used in the following senses :

(*a.*) " Dwelling-house " means a permanent building the whole or any part of which is kept by the owner or 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.

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(1) 1 Hale, 547, citing Spelm. Gloss. Tit. *Hamsecken* and *Burglaria*.
(2) 1 Bac. Ab. Tit. *Burglary*, 551 ; 3 Inst. 65.

408. Breaking place of worship.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who *breaks and enters* any place of public worship *and commits* any indictable offence therein, or who, having committed any indictable offence therein, *breaks out* of such place. R.S.C., c. 164, s. 35.

409. Every one is guilty of an indictable offence and liable to seven years' imprisonment who *breaks and enters* any place of public worship *with intent* to commit any indictable offence therein. R.S.C., c. 164, s. 42.

Upon an indictment for breaking into a parish church, and stealing two surplices and a scarf, it appeared that the surplices and scarf were stolen from a box kept in the church tower; this tower was built higher than the church, and had a separate roof, but it had no outer door, the only way of going into it being through the body of the church, from which the tower was not separated by a door or partition of any kind. It was objected that the stealing of these articles deposited in the tower was not sacrilege. But it was held that a tower, circumstanced as this tower was, must be taken to be part of the church, and that the stealing of these articles in the tower was a stealing in the church. (1)

Where, in another case it appeared that the offence had been committed by breaking into the vestry and stealing the sacramental plate out of a chest in the vestry; and the vestry had in old times been the porch of the church, and when the church was altered the porch was turned into the vestry room, and it had never been used for vestry purposes, but only for the robing of the clergyman, and the custody of the sacramental plate; and the vestry had a door opening into the body of the church, and another into the churchyard, which was always kept locked inside, Colerige, J, held that this vestry was as much a part of the church, for the purpose of this indictment, as the altar or the nave. (2)

410. Burglary.—Every one is guilty of the indictable offence called burglary, and liable to imprisonment for life, who—

(*a.*) breaks and enters a dwelling-house *by night* with intent to commit any indictable offence therein; or

(*b.*) breaks out of any dwelling-house *by night*, either after committing an indictable offence therein, or after having entered such dwelling-house, either by day or by night, with intent to commit an indictable offence therein. R.S.C., c. 164, s. 37. (24–25 Vict., c. 96, ss. 51, 52, 54, *Imp.*)

"*Night*" is the interval between nine P. M. and six A. M. of the following day. (See article 3 (*q.*) *ante*, p. 4.)

The ownership of the goods need not be stated in the indictment (3)

The intent to commit an indictable offence ought to be charged; (4) or it will be necessary to prove the commission of some indictable offence in the house after the breaking and entering. Thus, where an indictment was for burglariously breaking and entering a dwelling-house and then and there stealing goods therein and it omitted to state the intent, it was held that the defendant might be convicted of the burglary, if the stealing were proved but not otherwise. (5)

(1) R. v. Wheeler 3 C. & P. 585.
(2) R. v. Evans, 1. C. & M. 288.
(3) See article 613 (*b*), *post.* See, also, R. v. Clarke, 1 C. & K. 421.
(4) 1 Hawk. P. C. 559.
(5) R. v. Furnival, R. & R. 445.

Before the statute 7 Will, and 1 Vict., c. 86, sec. 4. (re-enacted in 24 and 25 Vict., c. 96, sec. 1), which first declared that for the purposes of a burglary the night should be from 9 P. M. to 6 A. M., many nice questions arose as to what fell within the meaning of "*night*." If the breaking and entering were in the night it was burglary; if in the day time it was not; if it were committed during twilight then if there were not day-light or *crepusculum* enough left to discern a man's face, it was burglary; otherwise it was not (1). But this did not extend to moonlight nights. (2)

Both a breaking and an entering are necessary to constitute burglary; and the breaking and entering must both be in the night. If the breaking be in the day and the entering in the night, or the breaking in the night and the entering in the day, it will not be burglary; but the breaking may be on one night and the entering on another; (3) provided the breaking be with intent to enter, and the entering with intent to commit an indictable offence. (4)

Every entrance into a house, in the nature of a mere trespass is not sufficient. Thus, if a man steals in a house which he enters by a door or window which he finds open, or through a hole or opening which was made there before, (unless it be such a permanent opening as a chimney *etc.*, as mentioned in article 407 (*b*) *ante*, he will not be guilty of burglary (5). But see Art. 415 *post*, as to being found in a dwelling house, at night. There must be either an actual breaking of some part of the house or a breaking by construction of law, as where the entrance is obtained by some threat or artifice, or by collusion with some one in the building, as provided by the second sub-clause of article 407 (*b*), *ante*.

Actual breaking.—Where, a cellar window, which was boarded up, had in it a round aperture of considerable size, to admit light into the cellar, and through this aperture one of the prisoners thrust his head, and, by the assistance of the other prisoner, he thus entered the house, but the prisoners did not enlarge the aperture at all; it was held that this was not, a sufficient breaking. (6) So where a hole had been left in the roof of a brewhouse, part of a dwelling-house, for the purpose of light, and it was contended that an entry through this hole was like an entry by a chimney; it was held that this was not a sufficient breaking. Bosanquet, J., "The entry by the chimney stands upon a very different footing; it is a necessary opening in every house, which needs protection; but if a man choose to leave an opening in the wall or roof of his house, instead of a fastened window, he must take the consequences. The entry through such an opening is not a breaking." (7)

The following are some examples of burglarious breakings;

Making a hole in the wall; forcing open the door; putting back, picking or opening the lock with a false key; breaking the window; taking a pane of glass out of the window, either by taking out the nails or other fastening, or by drawing or bending them back; putting back the leaf of a window with an instrument, drawing or lifting a latch; turning the key where the door is locked on the inside; or unloosing any other fastening which the owner has provided. (8)

Where a pane of glass had been cut for a month, but there was no opening whatever, as every portion of the glass remained exactly in its place, and the prisoner was both seen and heard to put his hand through the glass, this was held a sufficient breaking. (9)

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(1) 3 Inst. 63; 1 Hale 550; 4 Bl. Com. 224.
(2) 4 Bl. Com. 224; 1 Hale 551.
(3) 1 Hale 551.
(4) R. v. Smith, R. & R. 417; R. v. Jordan, 7 C. & P. 432.
(5) 4 Bl. Com. 225.
(6) R. v. Lewis, 2 C. & P. 628.
(7) R. v. Spriggs, 1 M. & Rob. 357.
(8) 1 Hale, 552: 3 Inst 64; 1 Hawk. P. C. c. 38; s. 6.
(9) R. v. Bird, 9 C. & P. 44.

So where a window opening upon hinges is fastened by a wedge, and pushing against it will open it, if such window be forced open by pushing against it, there will be a sufficient breaking. The prisoner got into the prosecutor's cellar, by lifting up a heavy grating, and into his house by forcing open a window which opened on hinges, and was fastened by two nails which acted as wedges, but would open by pushing it; upon a case reserved the judges held the forcing open the window to be a sufficient breaking. (1) So pulling down the sash of a window is a breaking, though it has no fastening, and it is only kept in its place by the pulley weight, although there was an outer shutter, which was not closed. The prisoner had entered the house by pulling down the upper sash of a window, which had no fastening, and was kept in its place by the pulley weight only; and there was an outer shutter but it was not put to. Upon a case reserved the judges held unanimously that pushing down the sash was a breaking. (2)

And raising a window which is shut down close, but not fastened, is a breaking, although there be a hasp, by which it could have been fastened and kept down. (3)

Cutting and tearing down a netting of twine which is nailed to the top, bottom, and sides of a glass window, so as to cover it, and entering the house through such window, though it was not shut, constitute a sufficient breach and entry. (4)

Where a window was partly open, but not sufficiently to admit a person's body, and the prisoner raised it higher and entered by the larger aperture thus made, it was unanimously held by the judges, on a case reserved, that this was not a breaking. (5)

Where, however, a square of glass in a kitchen window, through which the prisoners entered, had been previously broken by accident, and half of it was out at the time when the prosecutor left the house, and the aperture was sufficient to admit a hand, but not to enable a person to put his arm in, so as to undo the fastening of the casement, and one of the prisoners thrust his arm through the aperture, thereby breaking out the residue of the square, and having so done, he removed the fastening of the casement; Alderson and Patterson, JJ., entertaining a doubt from the difficulty they had to distinguish satisfactorily the case of enlarging a hole already existing, from the enlarging an aperture, by lifting up further the sash of a window, in the preceding case, submitted the case to the judges, who were unanimously of opinion that this was a sufficient breaking,—not by breaking the residue of the window pane,—but by unfastening and thus opening the window itself. (6)

On one occasion it was doubted whether getting into a house through the chimney was a sufficient breaking and entering to constitute burglary; but it was afterwards agreed that it was sufficient, on the ground that a house, with no opening, except through the chimney, is as much closed as the nature of things will permit (7). And it has been held that getting into the chimney of a house is a sufficient breaking and entering to constitute burglary, even if the party does not enter any room of the house. The prisoner got in at the top of a chimney and went down to just above the mantelpiece of a room on the ground floor; and upon a case reserved, two judges thought it was not a breaking and entering as the prisoner could not be considered as being in the dwelling-house when he had not got below the mantel-piece; but the ten other judges, held otherwise on the ground that the chimney was part of the dwelling-house, that

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(1) R. v. Hall, R. & R. 355.
(2) R. v. Haines & Harrison, R. & R. 451.
(3) R. v. Hyams, 7 C. & P. 441.
(4) Commonwealth v. Stephenson, 8 Pick, 354.
(5) R. v. Smith, R. & M., C. C. R., 178.
(6) R. v. Robinson, R & M., C. C. R., 327.
(7) 1 Hawk. P. C. c. 38, s. 6; 2 East, P. C. 485.

the getting in at the top was a breaking of the dwelling-house, and that the prisoner's lowering himself down was an entry within the dwelling-house. (1)

A case is reported, in which the breaking was held to be sufficient, though there was no interior fastening to the doors which were opened. The place which the prisoner entered was a mill, under the same roof, and within the same curtilage, as the dwelling-house: through the mill there was an open entrance, or gateway, capable of admitting wagons, and intended for the purpose of loading them more easily with flour by means of a large aperture or hatch, over the gateway, communicating with the door above: and this aperture was closed by folding doors, with hinges, which fell over it, and remained closed by their own weight, but without any interior fastening; so that persons on the outside, under the gateway, could push them open at pleasure, by a moderate exertion of strength. The prisoner entered the mill in the night, by so pushing open the folding doors, with the intention of stealing flour; and this was held to be a sufficient breaking, and the prisoner was accordingly convicted of burglary. (2)

But doubts were entertained whether lifting up the trap-door or flap of a cellar, which was kept down solely by its own weight, was a sufficient breaking; such trap-door or flap being used for the purpose only of taking in liquors to the cellar, and not as a common entrance for persons. The prisoner was indicted for stealing some bottles of wine in a dwelling-house, and afterwards burglariously breaking out of the house. The wine was taken from a bin, in a cellar of the house, which was a public house, and removed by the prisoner from the bin to the trap-door, or flap of the cellar, in getting out of which he was apprehended. The cellar was closed on the outside, next the street only by the flap, which had bolts belonging to it, for the purpose of bolting it on the inside, and was of considerable size, being made to cover the opening through which the liquors consumed in the public house were usually let down into the cellar. The flap was not bolted on the night in question, but it was proved to have been down; in which situation it would remain, unless raised by considerable force. When the prisoner was first discovered, his head and shoulders were out of the flap; and upon an attempt being made to lay hold of him, he made a spring, got quite out, and ran away, when the flap fell down, and closed in its usual way, by its own weight. Upon this evidence it was doubted whether there was a sufficient breaking to constitute the crime of burglary; and the prisoner having been convicted, the question was saved by the learned judge who presided at the trial, for the opinion of the twelve judges, who were divided in opinion as to this being a sufficient breaking. (3)

It has however, since been held, that lifting up the flap of a cellar, which was kept down by its own weight, is a sufficient breaking, although such flap may have been occasionally fastened by nails, and was not so fastened at the time the entry was made. (4)

A door or wall forming part of the outward fence of the curtilage and opening into no building, but into the yard only, was held to be no such part of the dwelling house as would render it burglary to break and enter by such door or wall; and it was held to make no difference that the door broken was the entrance to a covered gateway, and that some of the buildings belonging to the dwelling house and within the curtilage were over the gateway, and that there was a hole in the ceiling of the gateway for taking up goods into the buildings above. The prosecutor had a dwelling house, warehouses and other buildings and a yard; the entrance into the yard being through a pair of gates, which opened into a covered way. Over this covered way were some of the warehouses, and over the gates there was a loop-hole and crane to admit of goods being hauled up. There was also a trap-door in the roof of the covered way: and there was

(1) R. v. Brice, R. & R. 450.
(2) Brown's case, 2 East, P. C., c. 15, s. 3, p. 487.
(3) R. v. Callan, R. & R. 157.
(4) R. v. Russell, R. & M., C. C. R. 377.

free communication from the warehouse to the dwelling house. The prisoners broke open the gates in the night, with intent to steal. After breaking open the gates they entered the yard, but they did not enter any of the buildings. Upon a case reserved the judges where unanimous in holding that the outward fence of the curtilage, not opening into any of the buildings, was no part of the dwelling-house. (1)

An area gate opening into the area only is not such a part of the dwelling-house that the breaking of the gate will be burglary, if there be any door or fastening to prevent persons in the area from entering the house, although such door or other fastening may not be secured at the time. The prisoners opened an area gate in a street in London and entered the house through a door, which happened to be open within the area, but which door was usually fastened when the family retired for the night, and was one of the ordinary barriers against thieves. Having committed theft in the house a question arose whether the breaking of the area gate was a breaking of the dwelling house so as to constitute burglary; and as from the area into the house, there was no free passage in time of sleep, the judges held unanimously that the breaking was not a breaking of the dwelling house (2)

It has been held, and it is expressly declared by article 407 (*b*). *ante*, that the breaking requisite to constitute a burglary is not confined to the external part of the house, but may be of an inner door after the offender has entered by means of a part of the house which was open. Thus, if A enter the house of B, in the night time through the outward door which is open, or by an open window, and when within the house, turn the key of a chamber door, or unlatch it, with intent to steal, this will be burglary. (3) So where the prisoners went into the house of the cook at Serjeant's Inn, in Fleet street, to eat, and taking their opportunity, slipped up stairs, picked open the lock of a chamber door, broke open a chest, and stole plate, it was agreed that the picking open the lock of a chamber door, constituted burglary, though the breaking open the chest would not have done so. (4) And it will also amount to burglary if a servant in the night time open the chamber door of his master or mistress, whether latched or otherwise fastened, and enter for the purpose of committing murder or rape, or with any other felonious design; or if any other person, lodging in the same house, or in a public inn, open and enter another's room door, with such evil intent. (5) But it has been questioned whether, if a lodger in an inn should, in the night time, open the door of the chamber occupied by him, steal goods, and go away, the offence would be burglary; on the ground of his having a kind of special property and interest in his chamber, and the opening of his own chamber door being therefore no breaking in the inn-keeper's house. (6)

But he would be guilty of burglary, by breaking out, if, after stealing he not only opened his own chamber door but lifted a latch or turned a handle of the outward door so as to get completely out of the house. (7)

It is clear that the breaking open of a chest, or box, by a thief who has entered by means of an open door or window, is not a kind of breaking which will constitute burglary, because such articles are no part of the house. (8) But the question with respect to the breaking of cupboards, and other things of a like kind, when affixed to the free-hold, has been considered as more doubtful. Thus, at a meeting of the judges, upon a special verdict, to consider the point, whether breaking open the door of a cupboard let into the wall of the house

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(1) R. v. Bennett, R. & R. 289.
(2) R. v. Davis, R. & R. 322.
(3) 1 Hale, 553; 1 Hawk. P.C. c. 38, s. 6;
(4) Anon. 1 Hale, 524.
(5) 1 Hale 553, 554; 4 Bl. Com. 227
(6) 2 East, P. C. c. 15, s. 4, p. 488.
(7) R. v. Wheeldon, 8 C. & P. 747.
(8) 1 Hale, 523, 524, 525; 1 East, P. C. 489.

were burglary or not, it appears that they were divided upon the question. (1) Lord Hale says that such breaking is not burglary at common law. (2)

Constructive breaking.—Where in consequence of violence commenced or threatened in order to obtain entrance to a house, the owner, either from apprehension of the violence, or in order to repel it, opens the door, and the thief enters, such entry will amount to breaking in law: (3) for which some have given as a reason that the opening of the door by the owner, being occasioned by the felonious attempt of the thief, is as much imputable to him as if it had been actually done by his own hands. (4) And in a late case, where the evidence was, that the family within the house were forced by threats and intimidation to let in the offenders, Thompson, B., told the jury, that 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 that 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. (5) But if, upon a bare assault upon a house, the owner fling out his money to the thieves, it will not be a burglary; (6) though if the money were taken up in the owner's presence, it is admitted that it would be robbery. (7) And though the assault were so considerable as to break a hole in the house; yet if there were no entry by the thief, but only a carrying away of the money thrown out to him by the owner, the offence could not, it should seem, be burglary, though certainly robbery. (8)

Where an act is done, *in fraudem legis*, the law gives no benefit thereof to the party. Thus if thieves, having an intent to rob, raise hue and cry, and bring the constable, to whom the owner opens the door, and they, when they come in, bind the constable, and rob the owner, it is burglary. (9) And, upon the same principle, the getting possession of a dwelling-house by a judgment of ejectment obtained by false affidavits, without any colour of title, and then rifling the house, was ruled to be within the statute against breaking the house, and stealing the goods therein. (10) So if a man go to a house under pretence of having a search warrant, or of being authorized to make a distress, and by these means obtain admittance, it is, if done in the night-time, a sufficient breaking and entering to constitute burglary, or, if done in the day-time, house-breaking. (11)

If admission to a house be gained by fraud, though not carried on under the cloak of legal process, but merely by a pretence of business, it will also amount to a breaking by the construction of law. Accordingly, it was adjudged, that where thieves came to a house in the night-time, with intent to commit a robbery, and knocked at the door, pretending to have business with the owner, and, being by such means let in, robbed him, they were guilty of burglary. (12) And so where some persons took lodgings in a house, and afterwards, at night, while the people were at prayers, robbed them; it was considered that, the entrance into the house being gained by fraud, with an intent to rob, the offence was burglary. (13)

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(1) Fost, 108.
(2) 1 Hale, 527.
(3) 1 Hale, 553; 2 East P. C. 486.
(4) 1 Hawk, P. C. c. 38, s. 7.
(5) R. v. Swallow, M. S. *Bailey*, J.
(6) 1 Hawk, P. C. c 38, s. 3.
(7) 2 East, P. C. 486.
(8) 1 Hale 555.
(9) 3 Inst. 64, 1 Hale, 552, 553; Kel. 44, 82; 4 Bl. Com. 226.
(10) Farre's Case, Kel. 43.
(11) Gascoigne's case, 1 Leach, 284.
(12) Le Mott's case, Kel. 42; 1 Hawk. P. C., c. 38, s. 8.
(13) 1 Hawk. P. C., c 38, s. 9; 4 Bl Com. 227; 2 East P. C. 485.

In another case the entrance was gained by deluding a boy who had the care of it. The prisoner, who was acquainted with the house and knew that the family were in the country, asked the boy, who kept the key, to go with her to the house, promising him, by way of inducement, a pot of ale. The boy went with her, opened the door, and let her in; upon which she sent him for the pot of ale, and, while he was gone, she robbed the house and went away. This being in the night time, it was held that the prisoner was clearly guilty of burglary. (1)

Where a servant conspired with a thief to let him into his master's house to commit a robbery, and, in pursuance of this arrangement, opened the door or window in the night time and let him in, it was considered burglary both in the servant and the thief. (2)

In a subsequent case, two men were indicted for burglary, upon the following facts: One of the men was a servant in the house where the offence was committed. In the night time he opened the street door, let in the other prisoner, and shewed him the sideboard, from which the other prisoner took the plate. The servant then opened the door, and let his confederate out, but he himself remained inside, and went to bed. The judges were all of opinion that both prisoners were guilty of burglary; and they were accordingly executed. (3)

Entrance.—Any, even the least entry with any part of the offender's body or with any part of any instrument or weapon used by him is sufficient. (4)

So, that, where A., in the night time, cut a hole in the window shutters of B's shop, which was part of his dwelling-house, and, putting his hand through the hole, took out some watches which hung in the shop, within his reach, it was held to be burglary. (5) And if a thief breaks the window of a house in the night time, with intent to steal, and puts in a hook to reach out goods, or puts a pistol in at the window with intent to kill, it is burglary, in either case, although his hand be not in the window. (6)

In a case where thieves came in the night to rob A., who, perceiving their intent, opened his door, issued out, and struck one of the thieves with a staff, when another of them, having a pistol in his hand, and perceiving persons in the entry ready to interrupt them, put his pistol within the door, over the threshold, and shot, in such manner that his hand was over the threshold, but neither his foot nor any other part of his body, it was adjudged to be burglary. (7)

It has even been held that to discharge a loaded gun into a house is a sufficient entry, although neither the person discharging it nor any part of the gun be within the house. (8)

It seems therefore, that no distinction is to be made between the implied entry effected by discharging a pistol or other fire-arm into a house, and that effected by means of an instrument introduced within the window or threshold, for the purpose of committing an indictable offence.

Where it appeared that the prisoner had bored a hole with an instrument called a *centre-bit* through the panel of a house door, near to one of the bolts by which it was fastened; and that some pieces of the broken panel were found within the threshold of the door; but it did not appear, that any instrument, except the point of the *centre-bit*, or that any part of the bodies of the prisoners

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(1) R. v. Hawkins, 1 East, P. C. 485.
(2) 1 Hale, 553; 4 Bl. Com. 227.
(3) Cornwall's case, 2 Str. 881.
(4) See first sub-clause of article 407 (*b.*). See, also, R, v. Davis, R. & R., 499; R. v. Bailey, R. & R., 341.
(5) Gibbon's case, Fost. 107, 108.
(6) 3 Inst. 64; 1 Hale 555.
(7) 1 Hale, 553; 2 East, P. C. 490.
(8) 1 Hawk. P. C. c. 38, s. 11; See Pickering v. Rudd, 4 Camp. 220.

had been within the house, or that the aperture was made large enough to admit a man's hand ; the court held this not to be a sufficient entry. (1)

Introducing the hand between the glass of an outer window, and an inner shutter, is a sufficient entry to constitute burglary, on the ground that as the glass of the window is the outer fence, whatever is within the glass is within the house. A sash window was fastened in the usual way by a latch from the bottom of the upper sash to the top of the lower one, and there were inside shutters fastened within. The prisoner broke a pane in the upper sash, and introduced his hand within the window to undo the latch, but whilst he was cutting a hole in the shutter, with a centre-bit, and before he had undone the latch of the window, he was seized. The point reserved was whether the introduction of the hand between the window and the shutter to undo the window latch was a sufficient entry ; and the judges held that it was. (2)

In a more recent case where, in breaking a window in order to steal something in the house, the prisoner's finger went within the house, it was held that there was a sufficient entry to constitute burglary. (3)

Dwellinghouse.—Every house for the dwelling and habitation of man is taken to be a dwelling house in which burglary may be committed ; (4) and under the above article 407, clause (*a*), it means any permanent building the whole or any part of which the owner or occupier keeps for the residence therein of himself, his family, or servants, although, at intervals, unoccupied, and it includes also any building occupied with and within the same curtilage with it, provided there be between them a communication either direct or by means of a covered and enclosed passage; and evidence of the breaking and entering of a building so attached will sustain an indictment charging a breaking and entering of the dwelling house (5)

A dwelling house, therefore, in relation to the offence of burglary, is any place kept for the purpose of living in; and it will be sufficient if any part of the family of the owner or tenant live there. Thus where a servant boy of the prosecutor always slept over his brew house which was separated from his dwelling house by a public passage, but occupied therewith, it was held, upon an indictment for burglary, that as the brew house was used by the prosecutor's servant boy for sleeping in, it was the dwelling house of the prosecutor; although, being separated by the passage, it could not be deemed to be part of the house in which he himself dwelt. (6)

Sets of chambers in an inn of court or a college are deemed distinct dwelling houses, they being, in their nature and manner of occupation, as unconnected with each other as if they were under separate roofs. (7)

A burglary cannot be committed in a tent or booth in a market or fair, even although the owner lodge in it ; because it is a temporary, not a permanent edifice : (8) but if it be a permanent building, although used for the purpose of a fair, it may be a dwelling-house if a part of it be used as such during the fair. (9)

A loft situated over a coach-house and stables, in a public mews, and converted into lodging-rooms, has also been holden to be a dwelling-house. The prosecutor, who was coachman to a lady, rented the rooms at a yearly rent ; but he had never paid any rent ; and the rooms were not rated in the parish

(1) R. v. Hughes, 1 Leach, 606 ; 1 Hawk. P. C. c. 38. s. 12 ; 2 East, P. C. 491.
(2) R. v. Bailey, R. & R., 341.
(3) R. v. Davis, R. & R. 499.
(4) 3 Inst., 64.
(5) R. v. Garland, 1 Leach, 144.
(6) R. v. Westwood, R. & R. 495;
(7) 1 Hale, 522, 556; 3 Inst. 65 : See Monks v. Dykes, 4 M. & W. 365 ; Fenn v. Grafton, 2 Bing. N. C. 617 ; 2 Scott, 56.
(8) 1 Hawk, c. 38, s. 35 ; 1 Hale 557.
(9) R. v. Smith, 1 M. & R. 256.

books as dwelling-houses, but as appurtenances to the coach-house and stables; the way to the coach-house and stables was down a passage out of the public mews, to a staircase which led to these rooms, and the entrance to which staircase was through a door, which was never fastened, but there was a door at the top of the staircase to the rooms, which was locked at night, and was broken by the prisoner. It was contended, on behalf of the prisoner, that these rooms, which probably were originally intended as mere hay-lofts, did not, in contemplation of law, form such mansions or dwelling-houses, as to become the subject of burglary; but the objection was overruled by the court, who thought that the circumstance of these rooms being situated over the coach-house and stables, would not alter the nature of the case; and that they were, to all intents and purposes, the habitation and domicile of the prosecutor and his family. (1)

Where the prosecutor's house consisted of two living rooms, and another room used as a cellar, downstairs, and of three bed-rooms up stairs, the bed-room over the wash house and the bed room over the house place communicating with that over the wash-house, but there being no internal communication between the wash-house and any of the rooms of the house, though the whole were under the same roof, and it appeared that the defendant broke into the wash-house and was breaking through the partition wall between the wash-house and the house-place, it was held that the defendant was properly convicted of burglary in breaking the house (2)

But where adjoining to the house was a kiln, one end of which was supported by the wall of the house, and adjoining to the kiln there was a dairy, one end of which was supported by the wall of the kiln, the roofs of all three being of different heights, and there being no internal communication from the house to the dairy, it was held that burglary was not committed by breaking into the dairy. (3)

Where the prisoner entered a loft, beneath which were four apartments, inhabited as a dwelling-house, but which did not communicate with the loft in any manner whatever; and on the side of the dwelling house was a shop, which was not used as a dwelling, and which did not communicate with the four chambers, there being between this shop and the loft a communication by a ladder and the dwelling and shop both opened into the same fold; Holroyd, J., held the loft to be a dwelling-house. (4)

A Mr. Smith having purchased a house with an intention to reside in it, had moved into it some of his furniture and effects; the house was put under the care of a carpenter for the purpose of being repaired; but Mr. Smith had not himself entered into the occupation of any part of it, nor did any part of his family, nor any person whatever sleep therein. While the house was in this situation, it was broken open in the night time; and upon a case reserved for the consideration of the judges, they were of opinion that it could not be considered a dwelling-house, being entirely uninhabited; and that therefore, there could be no burglary. (5) In another report of this case, (6) it is stated that no goods were in the house at the time it was broken open, and that the judges were therefore also of opinion that it was no burglary, because, as the indictment charged an intent to steal, it must mean to steal the goods then and there being in the house, and that nothing being in the house, nothing could be stolen; but it is also further stated, that it seemed to be the sense of the judges and Eyre, B. declared it to be his opinion, that although some goods might have been put into the house, yet if neither the party nor any of his family had inhabited it, it would not be a mansion-house in which burglary could be committed.

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(1) R. v. Turner, 1 Leach, 305 : 2 East, P. C. 492.
(2) R. v. Burrowes, 1 Mood, C. C. 274.
(3) R. v Higgs 2 C. & K. 322.
(4) Thompson's case, 1 Lew 32.
(5) R. v. Lyons and Miller, 1 Leach, 185.
(6) 2 East. P. C. 497.

Where a house (which a former tenant had quitted), was taken by a new tenant, who put all his furniture into it, and frequently went thither in the day time, but neither himself, nor any of his family had ever slept there, it was ruled that burglary could not be committed therein. (1)

And, though persons sleep in a house thus situated, yet, if they are not of the family of the owner, it will still not be a dwelling-house in which burglary can be committed. Thus, where the prisoner was indicted for a burglary in the dwelling-house of a Mr. Holland, and it appeared that the house was newly built and finished in every respect, except the painting, glazing, and the flooring of one garret; that a workman, who was constantly employed by Mr. Holland, slept in it for the purpose of protecting it, but that no part of Mr. Holland's domestic family had taken possession of it; the court held that it was not the dwelling-house of Mr Holland. (2)

So in a case where it appeared that the prosecutor had lately taken the house which was broken open; that he himself had never slept there nor any of his family; but that on the night in which it was so broken, and for six nights before, he had procured two hairdressers, who were not in any situation of servitude to him, to sleep there for the purpose of taking care of his goods and merchandize, which were deposited therein; the court was of opinion, that the house could not, in contemplation of law, be considered as the dwelling-house of the prosecutor (3)

Where the owner of the house has no intention of going to reside in it himself, and merely puts some person to sleep there at nights till he can get a tenant, the same rule applies, and the house, under such circumstances, cannot be considered as the dwelling-house of the owner. The point arose upon the following facts. Mr. Pearce was a brewer, and the owner of a public house in which the offence was committed. The house, at the time of the offence, was shut up, and in the day time entirely uninhabited; but a servant of the owner was put to sleep in it at night, for the protection of the goods, until some other publican should take possession of it. There were in the house a number of beds, chairs, and other articles of furniture, which the owner had purchased of the former tenant, with a view to accommodate the person to whom he might let it, but with no intention of residing in the house himself, either personally, or by means of any of his servants. Upon a case reserved, the judges were of opinion, that as the owner never intended to inhabit the house, it could not, in contemplation of law, be considered as his dwelling-house; and that it would have been no burglary if the house had been broken in the night. (4)

Where the owner of the house has never, by himself or by any of his family slept in it, though he has used it for his meals, and all the purposes of his business, it is not his dwelling-house, so as to make the breaking thereof burglary. One Clayson took a house in which he carried on his business of a shopkeeper, and dined, entertained his friends, and passed his days there and had bedding up-stairs; but he always slept at his mother's, two doors, off, and he had no servant sleeping in the house. An indictment for burglary described this as his dwelling-house, and the prisoner was convicted but the judges held, that it could not be deemed his dwelling-house, and; that the conviction was wrong (5)

When the owner or occupier has once entered into possession and begun to use the house, as a dwelling, either by himself, or by some of his family, it will not cease to be his dwelling-house by reason of any occasional or temporary absence, even though no person be left in it. (6) Thus if A. have a dwelling-

(1) R. v. Hallard, 2 East, P. C. 498; 2 Leach 701; R. v. Thompson, 2 Leach 771.
(2) R. v. Fuller, 2 East, P. C. 448: 1 Leach, 186, note *b*:
(3) R. v. Harris, 2 Leach 701.
(4) R. v. Davies, 2 Leach, 876.
(5) R. v. Martin, R. & R. 108.
(6) Fost. 77; 3 Inst. 64.

house, and upon occasion he and his family be absent for a night or more, burglary may be committed in their absence; and so, if A. have two residences and be sometimes with his family at one and sometimes at the other, the breach of one of them in the night time in the absence of his family will be burglary. (1)

Also if A. have a chamber in a college or inn of court, where he usually lodge in term time; and in his absence in the vacation, his chamber be broken open in the night, the same rule will apply. (2)

A., having a residence in Westminster, took a journey into Cornwall with the intention of returning; and he sent his wife and family out of town, leaving the key with a friend who was to look after the house. After A. had been gone a month, the house,—there being no one in it,—was broken into, in the night, and robbed. A month afterwards A. returned to the house to live there. *Held*, that the breaking was a burglary. (3)

In another case it was held that the prosecutor's residence was still his dwelling-house, although he and his family had left six months before, he having left his furniture in it, and having the intention to go back to it. (4)

In these cases, there must be an intention on the part of the owner or occupier to return to his house, *animus revertendi*. If he has quitted without any intention of returning, the breaking of a house so left will not be burglary. (5)

For instance, A. and B. were indicted for a burglary in the dwelling-house of C., who, at the end of the summer, had removed with his whole family from his country house to his London residence. In the following November his country house had been broken open, and, in part, rifled: whereupon he removed, from it, the rest of his furniture, except a clock a few old bedsteads and some lumber. Being asked whether, when he so disfurnished the house, he had any intention of returning to reside there, C declared that he had not come to any settled resolution whether to return or not; but was rather inclined totally to quit the house, and to let it for the remainder of the term which he held in it. *Held*, that C. having left the house and disfurnished it without any settled resolution of returning, but rather inclining to the contrary, the house could not be deemed his dwelling-house at the time of the commission of the offence; and the jury were directed to render a verdict of acquittal as to the burglary, which they accordingly did, but found A. and B. guilty of stealing the clock etc. (6)

So, if a man leaves his house without any intention of living in it again, and means to use it as a warehouse only, and has persons, not of his family, to sleep in it to guard the property, the house cannot be described as his dwelling-house. One Cox lived in St Martin's lane, but removed to the Haymarket, and kept the house in St. Martin's lane as a warehouse only; none of his family or servants remained there, but two women who worked for him in his business slept there to guard the property; the prisoner stole to the amount of above forty shillings in the house, and was convicted upon an indictment against him describing the house as the dwelling-house of Cox; but upon a case reserved, the judges held that the conviction was wrong. (7)

But though a man leave his house, and never mean to live in it again, yet, if he uses part of it as a shop, and lets a servant and his family live and sleep in another part of it for fear the place should be robbed, and lets the rest to lodgers, the habitation by the servant and his family is a habitation by the owner, and the shop will still be considered part of his dwelling-house. The indictment was

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(1) 1 Hale, 556.
(2) 1 Hale, 556.
(3) R. v. Murry, 2 East P. C. 496.
(4) R. v. Kirkham, 2 Stark, Ev. 279.
(5) Fost, 77; 4 Bl. Com. 225.
(6) R. v. Nutbrown, Fost, 76, 77.
(7) R. v. Flannagan, R. & R. 187.

for burglary in the dwelling-house of Bendall, and the place broken into was a shop, parcel of a dwelling-house, which he had inhabited. He had left the dwelling-house, and never meant to live in it again but retained the shop and let the other rooms to lodgers. After some time he had put a servant and his family into two of the rooms lest the place should be robbed, and they lived there. Upon a case reserved the conviction was sustained; it being held that the shop was still the prosecutor's dwelling-house; the putting in a servant and family to live there being considered different from putting them there to sleep. (1)

The mere casual use of a place, or the using it upon some particular occasions for particular purposes is not considered sufficient to constitute it a habitation where burglary can be committed. (2) Thus, it was held that the fact of a servant having slept in a barn, on the night in which it was broken open, and for several nights before, he being put there, *for the purpose of watching thieves*, did not make the offence burglary. (3) And the circumstance of a porter lying in a warehouse *to watch goods*,—this being only for a particular purpose,—was held not to make it a dwelling-house. (4)

It was formerly necessary to correctly state the ownership in the indictment and therefore the question of the ownership of the house at the time of being broken and entered, was then a matter of great importance. Although the allegation of ownership is no longer absolutely necessary, and its omission will not render the indictment objectionable or insufficient, (See article 613 *(b) post*), it is better to state, to whom the dwelling-house belongs; and it may not be out of place, here, to notice some of the cases on the subject of ownership and its exercise either by the owner's own occupation and that of his family and servants or by others who hold from him some interest which constitutes in them an ownership as to the whole or some part or parts of the dwelling-house.

With regard to the exercise of ownership by the occupation of the owner's servants, it has been held that, where apartments in a house belonging to a corporation were appropriated as lodgings for servants of the corporation a burglary, committed in them should be laid as committed in the corporation's dwelling-house. (5)

Where a servant lived rent free in a house belonging to his master, the master paying the taxes, and having his business carried on in the house, but the servant and his family being the only persons who slept there, and that part of the house in which his master's business was carried on being at all times open to those parts in which the servant lived, it was held, upon an indictment for breaking and entering that part of the house in which the master's business was carried on, that it was properly described as the servant's house; but the judges would not say that it might not also, have been described as the house of the employer. (6)

Where a servant lived in a cottage quite distinct from his master's house, and had entire control over the cottage, it was held that it might be described as his dwelling house, although he paid no rent for it, and might be liable to give it up whenever his service was terminated. Upon an indictment for a burglary in the dwelling-house of J Lewis, it appeared that Lewis was a gardener to the Baron de Rutzen, and that he occupied, as gardener, a cottage in his master's garden, that he slept in the cottage, and kept the key, but took his meals with the other servants in the house; he paid no rent, and considered himself liable to give up the cottage whenever he ceased to be gardener. It was objected that Lewis took no interest in the cottage, but merely occupied it in right of his master, and that

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(1) R. v. Gibbons R. & R. 442.
(2) 2 East; P. C. 497.
(3) R. v. Brown, 2 East, P. C. 501.
(4) R. v. Smith, 2 East, C. P. 497.
(5) R. v. Pickett, 2 East P. C. 501; See R. v. Maynard, 2 East, P. C. 501; See, also, R. v. Hawkins, Fost. 38.
(6) R. v. Witt, 1 Moo. C. C. 248.

it should therefore have been described as the dwelling-house of the master. Lord Denman, C. J., "As the building in which the servant slept is quite distinct and apart from the master's place of residence, and he had a perfect control over it, and kept the key, I think that it is well described as the dwelling-house of the servant; but I do not think that the indictment would have been bad, had it laid the house as that of the master (1)

Where a servant had part of a house for his own occupation and the rest was reserved by the proprietor for other purposes, it was held that the part reserved could not be deemed part of the servant's dwelling house, and that it would be the same if any other person had part of the house, and the rest was reserved. The governor of a workhouse was appointed under contract for seven years, and was to have the chief part of the dwelling-house for his own and his family's occupation, the guardians and overseers who appointed him reserving the use of one room for an office, and three others for store-rooms. The governor was assessed for the dwelling-house, excepting the reserved rooms. The office having been broken into the indictment described it as the governor's dwelling-house; but, after conviction, upon a case reserved, the judges held that the description was wrong. (2)

An indictment for burglary, in one count alleged it to have been committed in the dwelling-house of Bromage, and in another in the dwelling-house of the Earl of Coventry. It appeared that Bromage had the house and firing for the services he had performed for the Earl during fifty years, but he did no work, and was allowed so much a week as an old servant; Littledale, J., held that this was sufficient to support the indictment, as the house of Bromage, or at all events, as the house of the Earl of Coventry (3)

Where a policeman was allowed to live in a house, in order to take care of it, and a wharf adjoining, it was held that the house was properly described as the dwelling-house of the policeman, on the ground that he must live somewhere; and he was not otherwise the servant of the owner than in the particular matter. (4) But where upon an indictment for burglary in the dwelling-house of Bird, it appeared that Bird worked for one Woodcock, who did business as a carpenter for the New River Company, and put him in to take care of the house and flock mill adjoining, which belonged to the company, and he received no more wages than he did before he lived there, nor had any agreement for any, it was doubted whether the house was properly laid, and it was thought that there might be some difference between this and the preceding case as here the man was put in by a person who did the work for the company, and it was thought the safest course to consider the indictment as not properly laying it to be the dwelling-house of Bird. (5)

It was held, however, that, where a servant lived in a house belonging to his master, at a yearly rent, such house could not be described as the master's house, though it was upon the premises where the master's business was carried on, and though the servant had it because of his services. Greaves and Co. had a house and buildings where they carried on their trade; Mettran, one of their servants, lived with his family in the house, and paid £11 per annum for rent and coals, such rent being much below the value; and Mettran was allowed to live there because he was servant; Greaves and Co. paying the rates and taxes. One of the buildings having been broken into, the indictment charged a burglary to have been committed in the dwelling-house of Greaves and Co., and it was urged that Mettran's occupation was their occupation: that the house he occupied might be deemed their dwelling-house; and that all their buildings might be deemed part of their dwelling-house. But upon a case reserved, the judges thought that as Mettran stood in the character of tenant.

(1) R. v. Rees, 7 C. & P. 568.
(2) R. v. Wilson, R. & R. 115.
(3) R. v. Ballard and Everall, 1 Russ. Cr. 3 Ed. 814.
(4) R. v. Smith, 1 Russ, Cr. 3 Ed. 815.
(5) R. v. Rawlins 7 C. & P. 150.

and Greaves and Co. might have distrained upon him for rent, and could not arbitrarily have removed him, Mettran's occupation could not be deemed their occupation, and that the conviction as to the burglary was wrong. (1)

Where a company in the country rented, for their agent, a house in London, in the upper part of which house the agent lived, with his family, and in the lower part whereof he transacted business for the company, it is reported to have been held by Graham, B., and Grose, J., that a burglary committed in the house was well laid to have been committed in the dwelling-house of the agent: the use of the house being given by the company to the agent as part of the remuneration for his services. (2)

Where, with certain wages, a laborer had a cottage to live in, rent free, it was held that as he occupied it for his own benefit, and not for the benefit of his master, it was properly described as the dwelling-house of the laborer. (3)

Where a person was employed by the lessee of tolls to collect such tolls, at a weekly salary, besides the privilege of living in the toll-gate house, erected by the trustees of the road, and the toll-gate house was broken and entered in the night time, it was held that the house was well described as the dwelling-house of the toll-gate keeper. (4)

With regard to the exercise of the ownership of a house by persons other than the proper owner thereof, it seems that where they have no fixed or certain interest in any part of the house the proper owner retains the ownership in himself; as for instance, where persons are abiding in a house as guests, and a burglary is committed in any of their apartments, the indictment should lay the offence as committed in the dwelling-house of the proprietor of the house. (5)

So that where the chamber occupied by a guest in an inn was broken and entered at night, the indictment for the burglary should lay it as having been committed in the dwelling-house of the innkeeper. (6)

In one case, the prosecutor, who was a pedlar, came to a public house to stay all night, and fastened the door of his bed-chamber; when the prisoner, pretending to the landlord that the prosecutor had stolen his goods, under this pretence, with the assistance of the landlord and others, forced open the chamber door with intent to steal the goods mentioned in the indictment; and the prisoner accordingly stole them. These facts were found specially. Mr. Baron Adams, who tried the prisoner, doubting whether the bed-chamber could properly be called the dwelling-house of the prosecutor, as stated in the indictment, the case was submitted to the consideration of the judges. They all thought, that though the prosecutor had for that night a special interest in the bed-chamber, yet that it was merely for a particular purpose, namely, to sleep there that night as a travelling guest, and not as a regular lodger: that he had no *certain* and *permanent* interest in the room itself, but that both the property and the possession of the room remained in the landlord, who would be answerable *civiliter* for any goods of his guest that were stolen in that room, even for the goods then in question, which he could not be, unless the room were deemed to be in his possession. They thought also, that the landlord might have gone into the room when he pleased, and would not have been a trespasser to the guest; and that upon the whole the indictment was insufficient. (7)

The landlord in this case does not appear to have been privy to the felonious intent of the prisoner; but, on the contrary, was imposed upon by him, and induced to assist in breaking open the chamber, upon the supposition that the

(1) R. v. Jarvis, R. & M. C. C. 7.
(2) R. v. Margetts, 2 Leach, 930.
(3) R. v. Johling, R. & R. 526.
(4) R. v. Canfield, 1 Mood. C. C. 42.
(5) 1 Hawk. P. C., c. 38; s. 26.
(6) 1 Hale, 557.
(7) R. v. Prosser, 2 East, P. C. 502, 503.

guest within it had been guilty of felony: but even if the landlord had been an accomplice in the act of the prisoner, it seems that his offence would not have been burglary; for though it has been said that if the host of an inn break the chamber of his guest in the night to rob him it is burglary, (1) that doctrine is questioned; and it was well observed, that there seems to be no distinction between that case and the case of an owner residing in the same house, breaking the chamber of an inmate having the same outer door as himself, which would not be burglary. (2) It would only be simple theft.

A., the lessee of a house, suffered B., his son-in-law to live in it. B. failed, and left the house, but one of B's servants, C. continued in it. A., the lessee died, and the house was given up to the landlord, who through his steward suffered C. to continue in the house, and the only goods in the house belonged to C In an indictment for breaking the house, it was laid to be the house of C.. and upon the point being saved, the judges held that it was rightly laid, as C. was there not as a servant, but as tenant at will. (3)

Where the owner, who let out apartments in his house to other persons, slept under the same roof, and had but one outer door at which he and his lodgers entered, it was considered that all the apartments of such lodgers were parcel of the one dwelling-house of the owner; but, that if the owner did not himself dwell in the same house, or if he and his lodgers entered by different outer doors, the apartments so let out were the mansion, for the time being, of each lodger respectively; (4) and it was held, accordingly, that where a house was let out to several lodgers a burglary committed therein must be alleged to have been committed in the dwelling-house of the lodger whose apartments were broken and entered. (5)

Where a lodger occupied one room in a house, the landlady keeping the key of the outer door, it was held that this could not be described as his dwelling-house; (6) but it was otherwise where the house was divided into several chambers with separate outer doors. (7)

A burglary was committed in a house belonging to one Nash who however, did not live in any part of it himself, but let the whole of it out in separate lodgings from week to week; and an inmate named Jordan had two apartments in the house; namely, a sleeping-room up one pair of stairs, and a workshop in the garret; which he rented by the week as tenant at will to Nash. The workshop was the room broken open by the prisoner. And upon a case referred to the judges for their consideration, whether the indictment had properly charged the burglary in the dwelling-house of Jordan, ten of them were of opinion, that as Nash, the owner of the house, did not inhabit any part of it, the indictment was good. (8)

In a case in which it appeared that the house was situated in a mews, and the whole of it let out in lodgings to three families, with only one outer door, which was common to all the inmates, one of whom rented the parlour on the ground floor, and a single room up one pair of stairs; and that the parlour on the ground floor was the part of the house broken open; all the judges held that the offence was well laid in the indictment, as having been committed in the dwelling-house of the particular inmate. (9)

In another case it appeared that several persons rented of the owner different parts of the same house, so as to have amongst them the whole house, the

(1) Dalt. c. 151, s. 4.
(2) Kel. 94; 2 East, P. C. 502.
(3) R. v. Collett, R. & R. 498.
(4) R. v. Gibson, 1 Leach 357; Lee v. Gansel, Cowp. 8.
(5) R. v. Rodgers, 1 Leach 89.
(6) Monks v. Dykes, 4 M. & W. 567.
(7) Fenn v. Grafton, 2 Bing. N. C. 617; 2 Scott. 56.
(8) R. v. Carrell, 1 Leach, 237; 2 East, P. C. 506.
(9) R. v. Trapshaw, 1 Leach 427; 2 East, P. C. 506.

owner neither reserving nor occupying any part of it. One Choice rented of the landlord a shop and other rooms and one Ryan rented in the same house another shop and all the other rooms. The staircase and passage were in common, and the shops opened into the passage, which was enclosed and was part of the house. The prisoner having broken the passage door of Ryan's shop, was indicted for burglary in the dwelling-house of Ryan; and, upon the point being reserved, the judges had no doubt but that this was rightly described as the house of Ryan; and they held that the conviction was right. (1)

It was held that where a house was let to A. and a warehouse under the same roof, and with an inner communication, to A. and B., the warehouse could not be described as the dwelling-house of A. The indictment was for a burglary in the dwelling-house of J. Richards; and the breaking was into the warehouses under the same roof with J Richard's dwelling-house, and communicating with it internally; but the dwelling-house was let to J. Richards alone, and the warehouses were let to him and his brother, who lived elsewhere. Upon a case reserved, the judges held that the warehouses could not be deemed part of J. Richards' dwelling-house, as they were let to him and his brother, though by the same landlord, and that the conviction was therefore wrong. (2)

A building may be divided so as to form several separate dwelling-houses by letting off parts, and leaving no internal communication between the parts so let and the remainder of the building. An indictment charged that a burglary was committed in a house forming the centre of a building with two wings, one of which wings was the dwelling-house of A., and the other consisted of the dwelling-houses of B and C. respectively. The centre consisted of three manufactories in one of which A., B., D. and other persons were jointly concerned, and of the other two, D. was the sole proprietor. C. was merely in D.'s employ. There was no internal communication between the centre building and the houses of A. and B. nor between it and the house of C., except a window in the house of C. which looked into a passage that ran the whole length of the centre building. One count in the indictment alleged the centre building to be the house of C.; but the judges held that the window merely was not such an internal communication that the centre building could be deemed a portion of C.'s house. (3)

The Intent.—There must be an intent, to commit some indictable offence: and if the intention of the entry be alleged or be proved by the evidence to have been only for the purpose of committing a trespass the offence will not be burglary. An indictment charged the prisoners with a burglary in the dwelling house of A. with intent to steal the goods of B. It appeared that B. who was an excise officer had seized uncustomed bags of tea entered in the name of C., and being in C's possession without a legal permit, and after seizing them B. had removed them to his lodgings at A's house. The prisoners and many other persons broke open A's house in the night, with intent to take this tea. It was not proved that C. was in company with them; but the witnesses said, that they supposed the tea to belong to C.; and supposed that the fact was committed either in company with him, or by his procurement. The jury, being directed to find as a fact with what intent the prisoners broke and entered the house, found that they intended to take the goods on behalf of C., and, upon the point being reserved, all the judges were of opinion that the indictment was not supported; as, however outrageous the conduct of the prisoners was, in so endeavouring to get back A's goods, still there was no intention to steal. (4)

Where the intent laid was to kill a horse, and the intent proved was merely to lame him, in order to prevent him from running a race, the variance was held fatal. (5)

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(1) R. v. Bailey, R. & M., C. C. 23. See R. v. Mayor of Eye, 9 Ad. & E. 670.
(2) R. v. Jenkins, R. & R. 244: See R. v. Hancock, R. & R. 171.
(3) R. v. Egginton, 2 Bos. & P. 508.
(4) R. v. Knight and Roffey, 2 East, P. C 510.
(5) R. v. Dobbs. 2 East. P. C. 513.

Where the intent laid was to steal, and the intent proved was to carry away the defendant's trunk containing money which he had formerly embezzled from his master, it was held that the offence proved did not amount to a burglary, for it was no felony in the defendant to remove the money. (1).

Where the defendant was discovered in the chimney of a shop in the night time, and the jury found him guilty of breaking and entering with intent to steal, it was held that the evidence was sufficient to warrant the conviction. (2)

Where it appeared in evidence, that, upon entering the house at three o'clock in the day the owner found that some person had removed certain goods to a different part of the house from that in which he had placed them, seemingly for the purpose of stealing them; and the defendants afterwards, on the same evening, having broken and entered the house, were taken in it, before they had attempted to move or carry away anything; the prosecutor having failed at the trial to prove the burglary, was proceeding to prove the defendants guilty of the antecedent stealing: but the Court refused to receive the evidence, saying that the transactions were perfectly distinct. (3)

If there be evidence of a theft but none of burglary and none showing the theft to have been committed in the dwelling-house, the defendant may be convicted of the simple theft, and if two or more are indicted, one may be found guilty of the burglary and the other of the theft only. (4) And a verdict may be rendered finding the defendant guilty of an attempt if the evidence warrant it.(5)

Where a room-door was latched, and a person lifted the latch and entered the room, and concealed himself for the purpose of committing a theft there, which he afterwards effected; and two other persons were present with him when he lifted the latch, for the purpose of assisting him to enter, and screened him from observation, by opening an umbrella, it was held that those two were, in law, parties to the breaking and entering, and were answerable for the stealing which afterwards took place, though they were not near the spot when it was perpetrated. (6)

Where the intent laid was to steal the goods of J. W. and it appeared in evidence that no goods of any person of the name of J. W. were in the house, but that the name of J. W. had been inserted in the indictment by mistake; the judges held the variance to be fatal, and the defendant was acquitted. (7)

But where the indictment alleged the intent to be generally "the goods and chattels in the said dwelling-house then and there being" to steal, and charged the defendant with stealing the goods of A. therein, it was held to be satisfied by proof of a breaking into the house, with intent to steal the goods there generally, though the goods actually stolen did not belong to A. alone. (8)

The best evidence of the intent is, that the defendant actually committed the offence alleged to have been intended by him; (9) but any other facts may be given in evidence from which the intent may be presumed. It may be inferred from the nature of the weapon or instrument, with which the defendant is found armed, the place in which he is found, his own declarations, or from any other circumstances.

Where an indictment charges a breaking and entering, at night, with intent to commit an indictable offence, proof of the actual commission of an indictable

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(1) R. v. Dingley, 2 Leach, 840. c.
(2) R. v. Brice, R. & R. 450.
(3) R. v. Vandercomb & Abbot, 2 Leach 708.
(4) R. v. Butterworth, R. & R. 520.
(5) See article 711 *post*.
(6) R. v. Jordan, 7 C. & P. 432.
(7) R. v. Jenks. 2 East. P. C. 514.
(8) R. v. Clarke, 1 C. & K. 421.
(9) See R. v. Locost, Kel. 30.

offence will be sufficient and in fact the best evidence to establish the intent; but it is best to allege both the intent to commit and the actual commission of an indictable offence. (1)

It should be observed also, that different intents may be stated in the indictment. Thus, where the first count of an indictment for burglary laid the fact to have been done with intent to steal the goods of a person, and the second count laid it with intent to murder him; it was objected upon a general verdict of guilty, that there were two several capital charges in the same indictment, tending to deprive the prisoner of the challenges to which he would have been entitled if there had been distinct indictments, and also tending to perplex him in his defence; but the indictment was holden good, on the ground that they were the same facts and evidence, only laid in different ways. (2)

Although an indictment charging a breaking and entering, *with intent* to commit an indictable offence, will be supported by evidence that, on breaking and entering the defendant *actually* committed the indictable offence charged, it seems that where the indictment charges a breaking and entering and the *actual* commission of an indictable offence, but does not charge the intent, it will not be supported, if the evidence merely shew a breaking and entering with intent to commit and no actual commission of the offence. It was, therefore, decided in a case in which the point was fully considered that an acquittal upon an indictment for burglary, in breaking and entering a dwelling-house *and stealing* goods, could not be pleaded in bar to an indictment for burglary in the same dwelling-house, on the same night, *with intent* to steal, on the ground that the several offences described in the two indictments could not be said to be the same. The indictment charged the prisoners with burglariously breaking and entering the dwelling-house of M. Nevill and A. Nevill, *with intent to steal* their goods; and the prisoners pleaded a plea of *autrefois acquit* upon a former indictment, which charged them with burglariously breaking and entering the dwelling-house of M. Nevill and A. Nevill, *and stealing* goods of M. Nevill, goods of A. Nevill, and goods of one S. Gibbs. The plea concluded with averring the identity of the persons of the prisoners, and that the burglary was the same identical and individual burglary. To this plea there was a demurrer, which was argued before all the judges of England; and their opinion was afterwards delivered by Mr. Justice Buller at the Old Bailey, June Session, 1796. The learned judge said, that it had been contended on behalf of the prisoners, that as the dwelling-house and the goods in relation to which the burglary was charged to have been committed were precisely the same both in the indictment for the burglary *and stealing* the goods, (on which they were acquitted), and in the indictment for the burglary *with intent to steal* the goods, (which was then depending), the offence charged in both was, in contemplation of law, the same offence, and that of course the acquittal on the former indictment was a bar to all further proceedings on the latter. He then proceeded, "It is quite clear, that at the time the felony was committed, there was only one act done, namely, the breaking the dwelling-house. But this fact alone will not decide this case, for

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it is necessary to the completion of burglary that there should not only be a breaking and entering, but the breaking and entering must be accompanied with a felony *actually* committed or *intended to be* committed. In the present case, therefore, evidence of the breaking and entering *with intent to steal* was rightly held not to be sufficient to support the indictment charging the prisoner with having broken and entered the house *and stolen* the goods stated in the first indictment." The learned judge,—after referring to several authorities on the subject of the defence of *autrefois acquit*,—continued; "These cases establish the principle, that unless the first indictment were such that the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second. Now, to apply the principle to the present case: the first indictment was for burglari-

(1) 1 Hale, 549, 560; 2 East, P. C. 514; R. v. Furnival, R. & R. 445.
(2) R. v. Thompson, 2 East, P. C. 515.

ously breaking and entering the house and *stealing the goods* mentioned; but it appeared that the prisoners broke and entered the house *with intent to steal*, for, in fact, no larceny was committed; and therefore they could not be convicted on that indictment. But they have not been, tried for burglariously breaking and entering the house *with intent to steal*; which is the charge of the present indictment, and therefore their lives have never been in jeopardy for this offence. For this reason, the judges are all of opinion that the plea is bad; that there must be judgment for the prosecutor upon the demurrer: and that the prisoners must take their trials on the present indictment." The prisoners were accordingly tried and convicted. (1)

It will be seen that the essentials of the crime of burglary, as defined and punished under article 410, are,—1, a breaking and entering a dwelling-house, by night, with intent, to commit an indictable offence therein; 2, a breaking out of a dwelling-house, by night, after committing an indictable offence therein; and 3, a breaking out of a dwelling-house, by night, after having entered it, by day or by night, with intent to commit an indictable offence therein. But article 410 does not expressly declare that it is burglary to break and enter a dwelling-house, by night, and *commit* an indictable offence therein. *Quaere*, would it, therefore, be sufficient in an indictment for burglary, under article 410 to allege a breaking and entering of a dwelling-house by night and the *commission* therein of an indictable offence, without also alleging an intent to commit it? And if in a trial for burglary the evidence shewed that when the defendant broke and entered the house he had no intention whatever to commit any indictable offence therein, would he, by afterwards committing an indictable offence therein, become guilty of burglary under article 410?

The articles relating to house breaking (articles 411 and 412) expressly state that the offence is committed; 1, by breaking and entering a dwelling-house, by day, and *committing* an indictable offence therein; 2, by breaking out, of a dwelling house, by day, after having committed an indictable offence therein; and 3, by breaking and entering a dwelling-house, by day, *with intent* to commit an indictable offence therein.

If, upon an indictment for burglary it be proved that the breaking and entering were in the night time he may be convicted of house breaking under article 412; (2) and if the breaking and entering be not proved the defendant may be convicted (under article 345, *ante*), of stealing in a dwelling-house, if the property stolen amount to $25, or, if though, less than that amount, he has by threats put any one in the house in bodily fear; and if the stealing do not come within the terms of article 345 the defendant may be convicted of simple theft. (See article 713, *post*.)

411. House-breaking. — Every one is guilty of the indictable offence called house-breaking, and liable to fourteen years' imprisonment, who—

(*a*.) breaks and enters any dwelling-house by day and commits any indictable offence therein; or

(*b*) breaks out of any dwelling-house by day after having committed any indictable offence therein. R.S.C., c. 164, s. 40.

412. Every one is guilty of an indictable offence and liable to seven years' imprisonment who, by day, breaks and enters any dwelling-house with intent to commit any indictable offence therein. R.S.C., c. 164, s. 42.

See comments under article 410.

(1) R. v. Vandercomb and Abbott, 2 Leach, 708; 2 East, P. C. 159.
(2) R. v. Compton, 3 C. & P. 418.

The breaking and entering must be proved in the same manner as in burglary, (1) except that it need not be proved to have been done in the night-time; but if it be proved to have been done in the night time, so as to amount to burglary, it seems that the defendant may, notwithstanding, be convicted upon an indictment for burglary. (2)

The proof of the stealing will be the same as in any other case of theft; and the least removal, as we have seen already, will be sufficient. For instance, where it appeared that the prisoner after breaking and entering the house, took two half sovereigns from a bureau, in one of the rooms, but, being immediately detected, threw them under the grate in that room, Parke, J., held that this was a sufficient asportation to constitute the offence of house-breaking and stealing therein. (3)

If the prosecutor succeed in proving the theft, but fail in proving any of the other facts necessary to constitute the offence of house-breaking, the defendant may be convicted of simple theft; or if the prosecutor fail in proving the breaking and entry, and the goods be laid and proved to be of the value of twenty-five dollars, the defendant may be convicted of stealing in the dwelling-house.

A defendant may, if the evidence warrants it, be convicted of an attempt to commit the offence if the prosecutor fails to prove its actual commission. (See article 711, *post*.)

413. Breaking shop.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, either by day or night, breaks and enters and commits any indictable offence in a school-house, shop, warehouse or counting-house, or any building within the curtilage of a dwelling-house, but not so connected therewith as to form part of it under the provisions hereinbefore contained. R.S.C., c. 164, s. 41.

414. Every one is guilty of an indictable offence and liable to seven years' imprisonment who, either by day or night, breaks and enters any of the buildings mentioned in the last preceding section with intent to commit any indictable offence therein. R.S.C., c. 164, s. 42.

See comments under articles 410, 411 and 412, *ante*.

The breaking and entering must be proved in the same way as upon an indictment for burglary, except that it is immaterial whether the breaking and entry be by night or by day. If the proof of the breaking and entry fail the defendant may be convicted of simple theft.

A warehouse was, at one time, held to be such as factors or traders keep their goods in, for sale, and where customers go to view them, and not such as is used for the safe keeping of goods merely; (4) but this distinction is now exploded. (5) There is a *dictum* of Alderson, B upon the repealed statute 7 & 8 G. 4, c. 29, s. 15, that a *shop*, to be within it, must be a shop for the sale of goods, and that a mere workshop (such as a carpenter's or blacksmith's shop, would not be sufficient. (6) but Lord Denman, C J. dis-

(1) 1 Hale, 526; Fost. 108.
(2) See R. v. Pearce, R. & R. 174; R. v. Robinson, R. & R., 321.
(3) R. v. Amier, 1 C. & P. 344.
(4) R. v. Howard, Fost. 77, 78: See R. v. Godfrey, 1 Leach 278.
(5) See R v. Hill, 2 M. & Rob. 458.
(6) R. v. Sanders, 9 C. & P. 79.

sented from that *dictum*, and held that a blacksmith's shop, when used as a workshop only, was within the statute (1).

Where A. had in connection with his chemical works a building commonly called the machine house in which goods sent out were weighed, and in which a book was kept by A's servant for entering the goods weighed and sent out, and it also appeared that the time of the men employed in the works was also taken and their wages paid in that same building, the books in which their time was entered being brought there for the purpose of being entered up and for paying their wages, it was held upon an indictment for breaking and entering this building that it was a counting house. (2)

Article 407 (*a*) includes, as part of a dwelling-house, any building occupied with and being within the same curtilage with it, provided there be, between such building and the dwelling-house, "a communication either immediate or by means of a covered or enclosed passage leading from one to the other"; and the breaking and entering of any such building is punishable as burglary or house-breaking,—according to the facts,—under articles 410, 411, and 412, *ante*; but articles 413 and 414 also cover and punish the breaking and entering of any building which is within the curtilage of a dwelling-house, though not so connected with it,—either immediately or by means of a covered or enclosed passage,—as to form part of it. The word "*curtilage*" (which is derived from the Saxon word *curt*, signifying *court*), means a court, a yard, a garden, a field, or any piece of land, (with or without buildings on it), surrounding, or near and belonging to a messuage or dwelling-house; and so in olden times, the mansion or dwelling-house, in which burglary might be committed, included the out houses,—such as warehouses, barns, stables, cow-houses, dairy-houses, offices,—and all other buildings and erections, which were within the *curtilage*, or same common fence as the mansion house itself, though not under the same roof and not joined to the dwelling-house, upon the ground that the main house protected and privileged all its out-buildings, branches and appurtenances, if within the curtilage or common homestall. (3)

Articles 413 and 414 therefore make it an indictable offence to break and enter any building occupied with, belonging to, and within the curtilage of a dwelling-house.

415. Entering or being found in a dwelling-house, at night.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who unlawfully enters, or is in, any dwelling-house by night with intent to commit any indictable offence therein. R.S.C., c. 164, s. 39.

This article will meet cases in which the prisoner has entered (either by an open door or window or otherwise) a dwelling-house or is found therein, by night, and where, though there is no proof of any breaking or of the commission of any indictable offence, the circumstances shew an intent to commit one, and that the prisoner was there with that intent.

416. Being found armed with intent to break a dwelling house, etc.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who is found—

(*a*.) armed with any dangerous or offensive weapon or instrument *by day*, with intent to break or enter into any *dwelling-house*, and to commit any indictable offence therein; or

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(1) R. v. Carter 1 C. & K. 173.

(2) R. v. Potter, 2 Den. 235: 3 C. & K. 179; 20 L. J. (M. C.) 170.

(3) 3 Inst. 64; 1 Hale, 558; 4 Bl. Com. 225; 2 East, P. C. 493; 1 Hawk. P. C. c. 38, s. 21.

(*b.*) armed as aforesaid *by night*, with intent to break in any *building* and to commit any indictable offence therein. R.S.C., c. 164, s. 43.

For the definition of "offensive weapon," see article 3 (*r*), *ante*.

417. Having possession of burglars tools, or being disguised.— Every one is guilty of an indictable offence and liable to five years' imprisonment who is found —

(*a.*) having in his possession *by night*, without lawful excuse (the proof of which shall lie upon him), any instrument of housebreaking; or

(*b.*) having in his possession *by day* any such instrument with intent to commit any indictable offence; or

(*c.*) having his face masked or blackened, or being otherwise disguised, *by night*, without lawful excuse (the proof whereof shall lie on him); or

(*d*) having his face masked or blackened, or being otherwise disguised, *by day* with intent to commit any indictable offence. R.S.C., c. 164, s. 43.

For definition of "Having in possession", see article 3 (*k.*) *ante*.

In reference to article 417, the English Commissioners say: "These are extensions of the existing law. It is thought that being disguised by night, affords sufficient *prima facie* evidence of a criminal intent."

418. Every one who, after a previous conviction for any indictable offence, is convicted of an indictable offence specified in this part for which the punishment on a first conviction is less than fourteen years' imprisonment is liable to fourteen years' imprisonment. R.S.C., c. 164, s. 44.

See articles 628 and 676, *post*, as to the indictment and procedure when a previous conviction is charged.

PART XXXI

FORGERY.

"It is not possible to say precisely what are the documents the false making of which is forgery, at common law. But, by a great many different enactments, passed at different times, a great many forgeries have been made felonies, and as such, punishable with great severity.

The statute law was, for the most part, consolidated by the 24-25 Vict. c. 98.

Like the other consolidation Acts, the Forgery Act assumes that the common law definition of forgery is known. This definition however, is a somewhat intricate matter involving various questions as to the extent of falsification implied in forgery; the character of the intent to defraud essential to it, and the circumstances essential to the completion of the crime. These matters are dealt with in sections 313 to 317 both inclusive (1)

The part relating to Forgery, contains an enumeration of the various classes of documents, the forgery of which is punishable. They include all those which are mentioned in 24 & 25 Vict. c. 98, though not always in the same order or under the same names. They also include a considerable number of documents, (contracts, for instance, documents intended to be produced in evidence, and false telegrams). which are not included in that Act.

This part makes provision for the forgery of some documents as to which it is doubtful whether to forge them is or is not a common law offence.

Finally, it contains a general clause, (section 336), (2) punishing the forgery of any document, whatever, with intent to defraud the public or any person, or to pervert the course of justice, or to injure any person, or to deprive any person of or prevent his obtaining any office, &c.

We believe that few, if any, cases would be punishable under this section which would not be forgeries at common law. There is a considerable difference between this part and the corresponding chapter of the Bill. The general section (section 336), (3) corresponds very nearly to a similar provision in the Bill, which proposed to subject offenders against its provisions to a maximum punishment of seven years penal servitude instead of two years imprisonment with hard labor. Such an enactment would have rendered unnecessary a considerable part of the enumeration of documents contained in the Draft Code. The provision was regarded as objectionable on the ground that it authorised a sentence of penal servitude for the forgery of various documents which were not defined, and the forgery of which could be at present punished by fine and imprisonment only. The difference in length between the Draft Code and the Bill is to a great extent due to the manner in which, perhaps *ex abundanti cautelâ* the former deals with each particular forgery. In the result, there will, we believe, be but little practical difference. The Draft Code adheres more closely than the Bill to the existing law, and is in these matters more explicit and detailed.

The provisions as to preparations for forgery are chiefly re-enactments of existing statutes.

In section 356, (4) we have re-enacted 25-26 Vict., c. 88, as

(1) Sections 313 to 317 of the English Draft Code correspond with articles 419 to 422 of the present Code.

(2) See clause C (*n*) of article 423, *post*.

(3) See clause C. (*n*) of article 423 *post*.

(4) Section 356 English Draft Code corresponds with Article 443 *et seq* of the present code.

to Trade Marks, omitting some clauses which seem not practical." Eng. Commrs'. Rep.

419. Meanings of "Document," "Bank note," "Exchequer bill," "False document."—A *document* means, *in this part*, any paper, parchment, or other material used for writing or printing, marked with matter capable of being read, but does not include trade marks on articles of commerce, or inscriptions on stone or metal or other like material.

420. "*Bank note*" includes all negotiable instruments issued by or on behalf of any person, body corporate, or company carrying on the business of banking in any part of the world, or issued by the authority of the Parliament of Canada or of any foreign prince, or government, or any governor or other authority lawfully authorised thereto in any of Her Majesty's dominions, and intended to be used as equivalent to money, either immediately upon their issue at or 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.

421. The expression "*false document*" means—

(*a.*) a document the whole or some material part of which purports to be made by or on behalf of any person who did not make or authorize the making thereof, or which, though made by, or by the authority of, the person who purports to make it is falsely dated as to time or place of making, where either is material; or

(*b.*) a document the whole or some material part of which purports to be made by or on behalf of some person who did not in fact exist; or

(*c.*) a document which is made in the name of an existing person either by that person or by his authority, with the fraudulent intention that the document should pass as being made by some person, real or fictitious, other than the person who makes or authorizes it.

2. It is not necessary that the fraudulent intention should appear on the face of the document. but it may be proved by external evidence.

It will be readily seen that the expression "*false document*" as used in connection with forgery has a meaning entirely different from what is meant by a document which is false in the sense of being simply an untrue statement of facts. Where a letter purports to be signed by A. B., but is, as a matter of fact, signed by C. D., in A. B's name, without A. B's authority, a third party to whom it is shewn is deceived and led to believe that it is A. B's letter, which, in fact, it is not; and, in that sense, it is a false document, whether its contents are true or false. It may be a true document as to the facts set forth in it;

but whether true or false as a statement of facts, it is a false document in regard to the signature. If the letter, instead of being signed by C. D., in A. B's name, were really signed by A. B. himself, or by his authority, and if its contents were false, then, although a false document in the sense of being an untrue statement of facts, it would be a true and genuine document in regard to the signature, and no forgery. A document whose contents are true may thus be a forged false document; and a document which contains false statements of fact may, nevertheless, be a genuine document, in the sense of being no forgery; although it may amount to and be punishable as a false pretence. For instance, if in a letter, written and signed in his own name, A. make a false statement, whereby B. is induced to part with his money or goods, the letter would not be a false document in the sense of being a forgery, but it would be a written false pretence.

422. Forgery defined.—Forgery is the making of a *false* document *knowing* it to be false, with the intention that it shall in any way be used or acted upon as genuine, to the prejudice of any one whether within Canada or not, or that some person should be induced, by the belief that it is genuine, to do or refrain from doing anything, whether within Canada or not.

2 Making a false document includes altering a genuine document in any material part, and making any material addition to it or adding to it any false date, attestation, seal or other thing which is material, or by making any material alteration in it, either by erasure, obliteration, removal or otherwise.

3. Forgery is complete as soon as the document is made with such knowledge and intent as aforesaid, though the offender may not have intended that any *particular* person should use or act upon it as genuine, or be induced, by the belief that it is genuine, to do or refrain from doing anything.

4. Forgery is complete although the false document may be incomplete, or may not purport to be such a document as would be binding in law, if it be so made as, and is such as to indicate that it was intended, to be acted on as genuine.

Forgery at common law is defined, by Blackstone, as "the fraudulent making or alteration of a writing to the prejudice of another man's right." (1) It has also been defined as "a false making, a making *malo animo*, of any written instrument, for the purpose of fraud or deceit"; (2) the word "*making*," in the latter definition, being considered as including every alteration, or addition to a true instrument,

As to the word *forge*, Lord Coke says, "To forge is metaphorically taken from the smith who beateth upon the anvil and *forgeth* what fashion or shape he will. The offence is called *crimen falsi*, and the offender *falsarius*; and the Latin word *to forge* is *falsare* or *fabricare*." (3)

Besides the offence of forgery at common law, which was of the degree only of misdemeanor, a great many kinds of forgery were specially subjected to severe punishments by various statutes, which, as stated by the English commissioners, (4) were, for the most part, consolidated by the Imperial Act, 24-25 Vict. c. 98.

(1) 4 Bl. Com. 247.
(2) 2 East, P. C. 852, 965.
(3) Inst. 169; 2 Russ. Cr. 3 Ed. 318.
(4) See p. 377, *ante*.

The gist of the offence of forgery, as defined by the present Code is the *knowingly making of any false document*, (defined by article 421), either, 1, *with intent*, that such false document shall be used or acted upon as genuine, to the prejudice of any one, or, 2, *with intent* that any one shall, by belief in its genuineness, be induced to do or refrain from doing anything; and it is expressly declared by article 422, that *making* shall include any material alteration in or addition to a genuine document; and that the forgery shall be complete as soon as the false document is made, "with such knowledge and intent as aforesaid."

It is unnecessary that the forgery should reach the point of being actually used or acted upon as genuine, or that it should have actually prejudiced any one. As soon as the false document is made with *intent* that it shall be acted upon or used as genuine, it is sufficient, and the forgery is complete without any further step being taken, and therefore without any uttering of it. For, although the publication or uttering of the instrument is the usual medium by which the intent is made manifest, the intent may be proved as plainly by other evidence.

Thus in a case where the note which the prisoner was charged with having forged, was never published, but was found in his possession at the time he was apprehended, no objection was taken to the conviction, on the ground of the note never having been published, there being in the case circumstances sufficient to warrant the jury in finding a fraudulent intention (1) In another case it was held by LeBlanc J., that though the note there in question had been kept in the prisoner's possession, and never attempted to be uttered by him, yet it was a question for the jury under all the circumstances of the case, whether the note had been made innocently or with an intent to defraud. (2)

The intent necessary is an intent that the false document shall be used or acted upon as genuine to some one's prejudice, or that some one shall be led by belief in its genumeness to do or refrain from doing something; and therefore, a man, who makes a false note, and issues and gets money or anything on it will have led some one to act on it as genume, and will be guilty of forgery although he may mean to take it up, and even if he actually does take it up, at maturity. In a case in point, the prisoner was tried for uttering a forged bill of exchange with intent to defraud S. Minor. It appeared that the parties to the bill were all fictitious persons, that circumstance being fully known to the prisoner at the time he uttered it, and that there was no doubt, that the names were forged, and the bill uttered by the prisoner with full knowledge of that fact. There was, however, reason to contend that the prisoner, who had filled a respectable station in life as a farmer, and who had endorsed the bill to Minor, intended at the time he so uttered it to take up and pay the bill when it arrived at maturity. No such intention, however, if it existed, was ever communicated to Minor. For the prisoner it was urged to the jury, that the existence of such an intention, if they believed it, was ground upon which they might properly negative the intention to defraud Minor as charged in the indictment; and a case was cited in which Lord Abinger, at the previous assizes for Shrewsbury, had so decided. In summing up the case, Alderson, B., told the jury, (after consulting Gurney B.,) that if they were satisfied that the prisoner uttered the bill in payment of a debt due to Minor, knowing at the time he so uttered it that it was a forgery, and meaning that Minor should believe it to be genuine, they were bound to infer that he intended to defraud Minor. The prisoner was found guilty; but Alderson, B., thought it proper, from respect to the opinion of Lord Abinger, to state a case for the opinion of the judges, in order to know if the rule laid down by him in his summing up to the jury was correct, and the judges having considered the case, were unanimously of opinion that the conviction was right. (3)

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(1) R. v. Elliott, 1 Leach, 175; 2 East P. C. 951.

(2) R. v. Crocker, R. & R. 97; 2 Leach 987.

(3) R. v. Hill, 2 Moo. C. C. R. 30. See also, R. v. Cooke, 8 C. & P. 582; R. v. Beard, 8 C. & P. 143; R. v. Boardman, 2 M. & Rob. 147; 2 Lew, 187; R. v. James, 7 C. & P. 553.

In another case, where it appeared that the forged bill had, since it was uttered, been paid before proceedings were taken against the prisoner, Parke, B., in addressing the jury said this made no difference and that they were bound to infer an intent to defraud from the fact of the forgery and the uttering. (1)

Upon an indictment for forging and uttering an order for the payment of money, signed John Phillips, with intent to defraud F. Rufford, and others, it appeared that the order was presented at Messrs Rufford's bank; but they would not pay the amount; and no person named John Phillips kept cash with them; it was objected that there could be no intent to defraud Messrs. Rufford, as there was not the most remote chance of their paying the money; but it was held that the prisoner's going to Messrs. Rufford's and presenting the paper for payment, was quite sufficient evidence of an intent to defraud them. (2)

It is forgery to execute a deed in the name of, and as representing another person, with intent to defraud, even though the prisoner has a power of attorney from such person, but fraudulently conceals the fact of his being only such attorney, and assumes to be the principal. (3)

An instrument may be a forgery by being falsely dated as to the time of making it; (article 471; and so it has been held that a man may be guilty of forgery by making a false deed in his own name; as, where A., having made a conveyance in fee of his land to B., afterwards fraudulently executed a deed of lease, for 999 years, of the same land, to C., which lease, by being ante-dated, purported to be prior to the conveyance in fee to B. (4)

The uttering of a note as the note of another has been held to be forgery, though such note was made in the same name as one of the prisoners. Two men named Parkes and Brown were indicted for forging and uttering a promissory note headed "Ringhton, Salop," purporting to be signed by *Thomas Brown*, and being for five guineas payable to bearer. The prisoner Brown uttered the note to one Hulls, a shoemaker, in paying for some boots, he (Brown) pretending that he was captain Brown of the 17th regiment, and that he had a brother who had just married a lady with £15,000 which his brother had deposited in the hands of Down and Thornton, bankers, London, and, in handing Hulls the note, he said "I am sorry I cannot pay you in gold; but I can give you what is just as good, one of my brother's drafts." Hulls asked him if it was on the money lodged with Down, Thornton & Co's, and Brown said it was: and added that his brother and he always paid in that manner on demand, for they wanted no credit. The note was soon discovered to be a forgery; and it appeared that Parkes and Brown were connected together; and when Parkes was arrested more than forty of these five-guinea notes in blank were found upon him. A few of the same sort of notes were also found concealed under a board in a shop where Brown was arrested, and which it was probable he had thrust there. The note in question was proved to be filled up in the hand-writing of Parkes, and the signature "Thomas Brown" was also in his (Parkes) hand-writing. In Parkes' pocket book was found a receipt, under cover, addressed to Thomas Brown, at the Compter, (the prison to which Brown had been committed), for £21, for four five-guinea bills. It was also proved that Down and Co. had no such customer as Thomas Brown.

Both prisoners were found guilty; the jury saying they thought Parkes signed the note in question with Brown's assent, and that Brown uttered it under a representation that it was his brother's, knowing that it was not so, with intent to defraud Hulls. The following objections to the conviction were taken by the counsel for the prisoners: first, that *Thomas Brown* was the real name of one of the prisoners: secondly, that it was no forgery in Parkes to sign the name of Thomas Brown, with his, Brown's, consent; thirdly, that if Parkes were not guilty of forgery,

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(1) R. v. Geach, 9 C. & P. 499. See R. v. Mazagora, R. & R. 291. and R. v. Carter, 7 C. & P. 134.

(2) R. v. Crowther, 5 C. & P. 316.

(3) R. v Gould, 20 U. C. C. P. 159.

(4) R. v. Ritson, L. R., 1 C C. R. 200; 39 L. J. (M. C.) 10.

Brown could not be guilty of uttering the note knowing it to be forged ; and fourthly, that the subsequent misrepresentation of Brown ought not to affect Parkes, as there was no evidence that he was aware of the fraudulent circumstances under which Brown was going to utter the note : the principle being, that mis-representations do not amount to forgery, or make that a forgery which was not so at the time of the original making.

These points were submitted to the consideration of the twelve judges, who held the conviction wrong as to Parkes ; but right as to Brown ; and Grose, J., afterwards delivered their opinion. He observed, as to the first objection, that the definition of forgery was, " the false making of a note, or other instrument, with intent to defraud ; which might be done either by using the name of one who did not exist, or of one who did exist, without his consent; that this was of the former description, being uttered by the prisoner as the note of his brother, no such person as his brother of that name appearing to exist : and that the circumstance of its being made in the same name as his own could not make any difference ; the note being uttered as the note of another, and not as his own. The same answer applied to the second objection. As no such person existed to whom the name of Thomas Brown, *as the signer of the note*, could apply, there could be no consent given to sign the name. It was signed by the authority of *a* Thomas Brown, but not of *the* Thomas Brown, for whose note it purported to be given ; for the person in whose name the note was made, was, according to the description of him in the note, then a resident at Ringhton, in Salop ; and it imported that he was a correspondent of Down, Thornton and Co. and had money in their hands ; and he was also represented to be the brother of the prisoner ; but no such person of that name and description appeared to exist. And all this was proved and found to be done for the purpose of fraud. Thirdly, that the indictment did not charge that Brown uttered the note knowing it to have been forged *by Parkes*, but only knowing it to have been *forged* ; and, therefore, let it have been forged by whomsoever it might, it was equally an offence in Brown to utter it " (1)

Coal, consigned to G. P. of New York, arrived, and was claimed by another of the name of G. P., who resided there, and he, knowing this, obtained an advance of money, on endorsing the permit for the delivery of the coal, with his own proper name. This was held to be forgery. (2)

If a bill of exchange, payable to A. B. or order, get into the hands of another person of the same name with the payee, and such person, knowing that he is not the real payee, in whose favour it was drawn, endorse it, for the purpose of fraudulently possessing himself of the money, he is guilty of forgery. (3)

It has been held that where there is no false making, it will be no forgery although a person falsely assume to be the real endorser of a bill and obtain money or goods upon it, and although all this be done in concert with the real endorser, and for the purpose of fraud The prisoner John Hevey was indicted for having, with intent to defraud, forged an endorsement in the name of Bernard McCarty on the back of a bill of exchange for £30 drawn in favor of McCarty upon and purporting to be accepted by Beatty & Co., Great St. Helens, London, and for uttering such forged endorsement. The evidence shewed that the prisoner Hevey went to the pawnshop of the prosecutors, to buy a watch and offered them the bill in question, with the endorsement then upon it, saying that it was a good bill, that his name was Bernard McCarty, that he had endorsed the bill, and that Beatty and Co , by whom the bill purported to be accepted were agents to the Bath Bank. The pawnbrokers sent their servant to enquire about the acceptance, and, on the latter returning and saying that he had seen a person who said the acceptance was good, they let the prisoner have the watch, and gave him the difference of the bill It was proved that the prisoner had always been known as John Hevey, but it also appeared that there was

(1) R. v. Parkes and Brown, 2 Leach 775 ; 2 East, P. C. 963.
(2) People v. Peacock, 6 Cowen, 72.
(3) Mead v. Young, 4 T. R. 28.

such a man as Bernard McCarty, and that the endorsement was, in fact, Bernard McCarty's hand writing. The jury found the prisoner guilty; but the case being afterwards submitted to the consideration of the judges they were all of opinion that it did not amount to forgery, the jury having found that there was no false endorsement but that the endorsement was truly made by a real person whose name it purported to be. (1)

The general principle upon which *making* a false document includes altering or adding to a genuine one, (as provided by the second paragraph of article 422), is that an alteration of any material part of a true instrument changes and falsifies the whole.

Upon an indictment for "making, forging and counterfeiting" a bill of exchange, and for uttering it knowing it to be forged, the prisoners were convicted upon evidence of an alteration of the bill, from £10 to £50. (2)

The fraudulent alteration of a material part of a deed is forgery, however slight the alteration may appear in itself; as, for instance, the making a lease of the manor of Dale appear to be a lease of the manor of Sale, by changing the letter D into an S; or by making a bond for £500, expressed in figures, seem to have been made for £5,000. (3)

Where a party made a copy of a receipt, added to such copy material words, not in the original, and, then, offered it in evidence on a suggestion of the original being lost, it was considered that he might be prosecuted for forgery. The words inserted were "in full of all demands." (4)

Altering the date of a bill of exchange after acceptance, and thereby accelerating the time of payment is forgery; (5) and so is altering a bill payable at three months into a bill payable at twelve months. (6)

Where a note of a country banker was made payable at their house in the country or at their bankers in London, and the London bankers had failed, it was forgery to alter the name of such London bankers to the name of another London banker, with whom the country bankers had made their notes payable subsequent to the failure; the judges deciding that the act done by the prisoner was a false making in a circumstance material to the value of the note, and its facility of transfer, by making it payable at a solvent instead of an insolvent house. The alteration was effected by pasting a slip of paper bearing the words *Ramsbottom & Co.*, over the words *Bloxam & Co.*, in the same manner as the prosecutors had themselves altered their re-issuable notes, after the failure of their first London bankers, Bloxam & Co. (7)

Altering a banker's one pound note by substituting the word *ten* for the word *one* was held to be forgery. (8)

Discharging one endorsement and inserting another, or making it thereby a *general* instead of a *special* endorsement has been held to be an altering of an endorsement, and to be a forgery. (9)

A person, having an order for delivery of wheat for the support of the poor persons in a municipality, is guilty of forgery, if he materially alters the order, so as to increase the quantity of wheat which is obtainable thereunder, with intent to defraud. (10)

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(1) R. v. Hevey, 1 Leach 229; 2 East P. C. 855.
(2) R. v. Teague, 2 East, P. C. 979; R. & R. 33. See R. v. Dawson, 1 Str 19.
(3) 1 Hawk. P. C., c. 70, s. 2. See R. v. Elsworth, 2 East, P. C. 986.
(4) Upfoln v. Leit, 5 Esp. 100.
(5) Master v. Miller, 4 T. R. 320; 2 East, P. C. 852.
(6) R. v. Atkinson, 7 C. & P. 669.
(7) R. v. Treble, 2 Taunt. 328; 2 Leach, 1040; R. & R. 164.
(8) R. v. Post, R. & R. 101.
(9) R. v. Birket & Brady, R. & R. 251.
(10) R. v. Campbell, 18 U. C. Q. B. 416.

The prisoner a railway station master had the paying of B., who was employed to do the collecting and delivering of parcels; and the company provided a form in which the charges due to B. were entered by the prisoner under the heads of "Delivery" and "Collecting" respectively. The prisoner having falsely told B., that the company would no longer pay for delivering, but only for collecting, continued to charge the company for the collecting as well as the delivering; and in order to furnish a voucher, after paying B's servant the sum entered in the form for collecting, and obtaining his receipt, in writing, for that amount, the prisoner, without either his or B's knowledge, put a receipt stamp under the servant's name, and put therein, in figures, (as the aggregate for collecting and delivering), a larger sum than he had actually paid. This was held a forgery. (1)

On an indictment for forgery, it appeared that a promissory note had been drawn by the prisoner, payable two months after date, to the order of one J. S., and afterwards endorsed by said J. S. and that the prisoner then altered the note, by making it payable three months after date, and discounted it at the Bank of British North America, in London, Ontario. The jury having convicted him of forgery, on motion for a new trial, on the ground that the forgery, or uttering, if any, was a forgery of or uttering of a forged endorsement, the note having been made by the prisoner himself, and that there was no legal evidence of an intent to defraud, it was held that the altering of the note while it was in his own possession, after endorsement, was a forgery of a note, and not of an endorsement, and that the passing of the note to a third party, who was thereby defrauded, was sufficient evidence of an intent to defraud. (2)

Where a party committing forgery uses a name different from his own, it is immaterial whether the name used be that of a person actually existing or that of a merely fictitious person who never existed. (See Article 421 *b*.). It is as much a forgery in the one case as in the other. (3)

Where the forgery is committed by using the name of an existing person it makes no difference whether the offender passes himself off for such person or not.

One Elizabeth Dunn was indicted for forging a promissory note with intent to defraud Edward Hooper. The prisoner, an illiterate woman, had applied to Hooper, at his office for receiving seamen's wages, and represented herself as Mary Wallace, the widow of a deceased seaman of the name of John Wallace, and obtained, from Hooper, a loan of three and a half guineas on the credit of the wages due to John Wallace. Hooper, on lending her the money, wrote out and asked her to sign the promissory note in question, and she subscribed to it her mark, which was attested by Hooper's clerk. She was asked what name was to be put to her mark, to which she answered, "You know my name. You may write Mary Wallace;" which he did. It was proved clearly that her name was Elizabeth Dunn, and that her whole story was a fabrication. The jury were directed to find the prisoner guilty, if they believed that she subscribed the note in a false name by a mark intended by her to express such false name with intent to defraud Hooper; and the jury found her guilty, accordingly. Judgment was respited upon a doubt whether the offence amounted to forgery, inasmuch as the note,—though made in an assumed name and character,—was her own note, made and offered as her own, and not as the note of another in contradistinction to herself. But, upon the case being submitted to the consideration of the judges, nine of them were of opinion that the prisoner was properly convicted. (4)

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(1) R. v. Griffiths, 4 U. C. L. J 240; Dears & B. 548; 27 L. J. (M. C.) 205.

(2) R. v. Craig, 7 U. C. C. P. 239; R. v. McNevin, 2 Rev. Leg. 711.

(3) R. v. Parkes, 2 Leach, 773; 2 East P. C. 963; R. v. Froud, 1 B. & B. 300; R. & R. 389; R. v. Wilks, 2 East P. C. 957; R. v. Webb, 3 B. & B. 228; R. & R. 405.

(4) R. v. Dunn, 1 Leach 57; 2 East, P. C. 962.

Forging in a false name assumed for concealment, with a view to a fraud, of which the forgery is part, is sufficient to constitute the offence. And if there be proof of the prisoner's real name, it is for him to prove that he used the assumed name before the time he had the fraud in view, even in the absence of proof as to what name he had used for several years before the fraud in question. (1)

In the following case, the general proposition that the use of a mere fictitious name is in itself sufficient to constitute forgery was first established. James Bolland was indicted for having, with intent to defraud one Cardeneaux, forged an endorsement in the name of *James Banks* on the back of a promissory note for £100, and for uttering the same. The maker and the payee of the note were real persons, and when the note came into the hands of Bolland, he at first endorsed it in his name, and tried to negociate it to one Jesson, who, however, said he would not be able to negociate it with Bolland's endorsement on it; whereupon Bolland said he could take his name off. Another person in company with Bolland then began with a knife to erase the name, and, after all but the initial letter "B" was scratched off, Bolland said, "Dont scratch it all out. I will think of some other name beginning with a B;" and he then made the name *Banks*. Jesson took the note, saying that he should be asked who Banks was, and Bolland said "He is a publican of Rathbone place." Jesson afterwards applied to Cardeneaux to discount the note, and obtained some money on account of it: and being pressed shortly afterwards by Bolland for the amount of the note, Jesson took and introduced Bolland to Cardeneaux, and told the latter that Bolland was the owner of the note. Cardeneaux enquired who Banks was, to which Bolland answered that he was a man of property and lived in Rathbone Place. Cardeneaux then gave Bolland the money in notes and cash, without asking him to endorse the note, as Jesson had before told him that it was better that Bolland's name should not appear on it, as he had been a sheriff's officer. It further appeared that the maker and a previous endorser became bankrupts before the maturity of the note; and when Cardeneaux applied to Bolland, for payment, at the maturity of the note, the latter denied having discounted any note with him, and said his name was James Bolland and that he had never seen Cardeneaux before. After Bolland was arrested, some person in the name of James Banks paid the £100 to Cardeneaux; but no such person as James Banks of Rathbone Place appeared to exist. Bolland was found guilty, sentenced to death, and executed. (2)

In a case where the prisoner was indicted for uttering a forged deed, purporting to be a power of attorney from Elizabeth Tingle, administratrix of her father Richard Tingle, deceased, late a marine belonging to His Majesty's ship the Hector, to F. Predham, of Bernard's-inn, &c, empowering the said Predham to receive all prize-money due to her, &c., the facts were clearly proved, and the prisoner was convicted. But a doubt was entertained, whether, as Richard Tingle had died childless, and as there was no such person as Elizabeth Tingle, the case amounted to forgery; and the point was referred to the consideration of the twelve judges. Eleven of them were very clearly of opinion, that it was forgery. (3)

A person endorsing a fictitious name on a bill of exchange to give it currency, will be guilty of forgery; and in a case which was stated to the judges, they were all of opinion, that a bill of exchange drawn in fictitious names, when there are no such persons existing as the bill imports, was a forged bill. (4)

If three persons, A. B. and C., have authority jointly to draw out money from a bank, and A, one of them, draw out the money by a cheque signed by himself and D. and E., two strangers who personate B., and C, it is forgery. (5)

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(1) R. v. Peacock, R. & R. 278.
(2) R. v. Bolland, 1 Leach, 83; 2 East, P. C. 958.
(3) R. v. Lewis, Fost, 116.
(4) R. v. Wilks, 2 East, P. C. 957.
(5) R. v. Dixon, 2 Lew. 178.

Where the prisoner obtained money from B., for a cheque on Jones, Lloyd & Co., purporting to be drawn by G. Andrews in favour of,—Newman, Esq. or bearer, telling him that it was for Mr. Newman, of Soho Square, in whose service he was for three months, and that Mr Newman had put his name on the back; and it appeared, upon an indictment for forging and uttering the cheque, that no person of the name of G. Andrews kept an account with Jones, Lloyd & Co., that Mr Newman of Soho Square did not write his name on the back of the cheque, and that the prisoner was never in that gentleman's service; Parke, J., held this to be sufficient *primâ facie* evidence that G. Andrews was a fictitious person, and told the jury that if G. Andrews really drew the cheque, the prisoner might produce him or give some evidence upon the subject. The prisoner was convicted. (1)

Upon an indictment for forging and uttering a bill of exchange, purporting to be drawn by T. W. of Nottingham and to be accepted by T. K., Market place, Birmingham, which bill was passed to the prosecutor by the prisoner, who represented his name to be King, of King Square, which he said was chiefly his property, the prosecutor proved that he made inquiry for T. W. of Nottingham, and could not find him; that he had been twice to Birmingham after T. K., but could find no such person, and that he had made enquiries at King Square, for the prisoner, but could hear of no such person; but he admitted that he was a stranger at these places, and no person acquainted with them was called; Parke, J., after consulting the judges present, held this to be sufficient evidence to go to the jury of the bill being a fictitious one, although he told them that it was not very satisfactory, and not the usual evidence upon such occasions. (2)

Where the prisoner was indicted for forging and uttering a cheque on Greenwood & Co. army agents and bankers, purporting to be drawn by J. Weston; and a clerk in the army department was called to prove that J. Weston kept no account with his employers; he admitting that he did not know the names of all the customers, but adding that he knew of no customer named J. Weston, and that, upon inquiry of the other clerks, he found that there was no such person: Parke J. with the concurrence of Patteson J. and Gurney B., held this to be *primâ facie* evidence sufficient to call upon the prisoner to show who J. Weston really was. (3)

If a person write an acceptance in his own name to represent a fictitious *firm*, with intent to defraud, it is a forged acceptance; for, if an acceptance represent a fictitious *firm*, it is the same as if it represented a fictitious *person*. The prisoner was indicted for uttering a forged acceptance of a bill of exchange, and it appeared that the prosecutor, in consequence of a newspaper advertisement, went to No. 3, Jewin-court, Jewin-street, and there saw the prisoner, and said he called in reference to the advertisement, which statted that money was to be obtained on freehold property, life interest, &c.: when the prisoner enquired the nature of the property, which the prosecutor described, and told the prisoner he wanted £150; the prisoner then said he had clients at Ipswich, who would purchase the property, and desired the prosecutor to call again in a few days, which he did; when the prisoner said he had seen his clients, and would give the prosecutor £100, which the prosecutor agreed to, and he ultimately agreed to take in payment two bills of exchange of £50 each. The prisoner said he had already received the bills from his clients and he produced them, accepted, and ready prepared, with the exception of the signature of the prosecutor as drawer; the prosecutor enquired who "Nicholson and Co.," the acceptors, were, and what they were; the prisoner said they were general merchants, residing at Ipswich and were highly respectable men, and that the bills would be paid at maturity. There was no address on the bills but "3 Jewin-court, Jewin-street," as their address, but the prisoner said that, although

(1) R. v. Backler, 5 C. & P. 118.
(2) R. v. King, 5 C. & P. 123.
(3) R. v. Brannan, 6, C. & P. 326.

they lived in Ipswich, the acceptors would be in town, and the bills would be paid at Praed and Co's, Fleet street, where they were made payable.

The prosecutor then, at the prisoner's request, put his name on the bills as drawer, and signed and handed to the defendant a deed transfering his property. When the bills matured, they were not paid. A clerk at Praed and Co's. proved that no *firm* of the name of Nicholson and Co. banked there, nor any *person* of the name of Nicholson; and a witness from Ipswich proved that he was well acquainted with that town and neighborhood, and knew nothing of any firm of Nicholson and Co., general merchants, there, and that he had made enquiries of the tax collectors and at the post-office, and had not been able to find any such firm or any general merchant named Nicholson. It was further proved that the bills, except the acceptance, were wholly in the handwriting of the prisoner, and that he had deposited the prosecutor's deed of transfer as a collateral for a joint note of hand. For the defence, a witness proved that he had seen a Thomas Nicholson at the prisoner's office many times, but was not positive whether he had been there when the prosecutor was, nor had he seen him write; and it was submitted for the defence that the acceptance was in the handwriting of this Thomas Nicholson, and that therefore it could not be deemed to be a forgery, as the adopting of a false description or addition was not a forgery, according to the case of Rex. v. Webb (1). For the prosecution, the application of Rex. v. Webb was denied as the addition of "and Co.", even if the jury should be of opinion that the acceptance was written by *a* T. Nicholson, rendered the acceptance that of a fictitious firm, and the false making of a note or acceptance in the name of a non-existing firm was a forgery; and Rex. v. Parkes (2) was relied on as an authority. Bosanquet, J. said to the jury. "The first question is, whether this acceptance is a forgery. Upon that point, if you think that it was not written by T. Nicholson, the case is relieved from doubt or difficulty. But it is said, on the part of the prisoner, that, if it was written by T. Nicholson, it is no forgery. I have no doubt, however, that the writing of an acceptance of an existing person without authority, or of the name of a firm or person non-existing, in an acceptance of a bill of exchange, with intent to defraud, is a forgery; and my opinion is, that if this acceptance was written by Nicholson to represent a fictitious firm, and with intent to defraud, it would amount to a forged acceptance. If you think that the acceptance represents that of a fictitious firm, it is the same thing as if it represented that of a fictitious person, and I should recommend you to find the prisoner guilty of having uttered a forged acceptance, if the evidence satisfies you that he knew it was forged, and that he uttered it with intent to defraud the prosecutor."

The jury found the prisoner guilty of uttering the acceptance knowing it to be forged, and that it was not written by T. Nicholson, (3)

It is immaterial whether any additional credit be gained by using the false name.

Edward Taft, was tried for forging an endorsement on a bill of exchange for fifty pounds, in the name of John Williams; and having been found guilty, the following case was submitted to the consideration of the twelve judges: The bill of exchange was drawn payable to the order of Messrs. Renwicke and Mee, by whom it was endorsed generally, and it afterwards became the property of one *William Wheewall*, out of whose pocket it had been picked or lost, with other things. The prisoner had, on the same night, endeavoured to negotiate it; but, being disappointed, he proceeded to Market Harborough, where he bought a horse of the landlord of the inn, and offered him the bill to change. The landlord, not having cash sufficient in the house, carried it to a banker's in the town, where the clerk told him that it was very good paper, for that he knew the payee who had endorsed it, and that if he, (the landlord), would put his name on the back of it, it should be immediately

(1) R. v. Webb, R. & R. 405.
(2) See R. v. Parkes and Brown, at p. 383, *ante*.
(3) R. v. Rogers, 8 C. & P. 629.

discounted. The landlord, however, not knowing the person from whom he had received it, refused to endorse it; but told the clerk that the gentleman was then at his house, and he would go and fetch him. He accordingly went to the prisoner, who accompanied him to the banker's, where the clerk told the prisoner that it was the rule of their house never to take a discount bill, unless the person offering such bill endorsed it; but that if he would endorse the bill in question, it should be discounted. The prisoner immediately endorsed it by the name of "*John Williams*," and the banker's clerk, after deducting the discount, gave him the cash for it. The prisoner's name was not John Williams. The judges were unanimously of opinion that this was a forgery within the statute on which the indictment was framed; for, although the fictitious signature was not necessary for the prisoner's obtaining the money, and his intent in writing a false name was probably only to conceal the hands through which the bill had passed, yet it was a fraud both on the owner of the bill, and on the person who discounted it; as the one lost the chance of tracing his property, and the other lost the benefit of a real endorser, if by accident the prior endorsements should have failed. (1)

It has been held that an order on a banker, for the payment of money, falsely purporting to be made by one who kept cash with such banker, was a forgery, though made in a fictitious name, or in the name of one who had no authority to draw on the banker; (2) and that a receipt, in a fictitious name, endorsed on a bill of exchange was also a forgery, although it did not purport to be the name of any particular person. (3)

In one case, where the credit was without doubt given personally to the prisoner, the security tendered being considered as his alone, the judges agreed unanimously that the offence amounted to a forgery. The prisoner was indicted for forging and also for uttering, knowing it to be forged, the following order for payment of money, and with intent to defraud James Elliott.

"Green Street 31 July 1781.

SIRS,

Pray pay to Mr John Atkins, or bearer, six pounds six shillings; value received.

Yours &c.

H. TURNER.

To Messrs BROWN, COLLINSON AND Co.,

Lombard Street."

It appeared that the prosecutor was a silversmith; and the prisoner, having looked out several goods at his shop, to the amount of six guineas, pulled out his purse, as if going to pay for them, saying, "I believe I have not cash enough about me, but here is a draft on a banker, which is the same thing as money, for it will be paid when presented." He accordingly laid the draft on the counter. Mr. Elliott looked at the draft as it lay on the counter; and seeing it was upon a house he knew, he took it, the sum being a small one, and the prisoner having a genteel appearance: and he then took his order-book, for the purpose of making a memorandum of the prisoner's direction; and supposing his name to be the same as that in which the draft, which he conceived to be the prisoner's, was signed, he wrote, "H. Turner, Esq." The prisoner looked over him, and desired him to add "Junior, Noah's Row, Hampton Court," and then went away. Mr. Elliot further stated, that he gave credit to the prisoner and not to the draft. It appeared that no person of the name of H. Turner kept cash at Brown and Collinson's, or lived in Green-street; nor could such a place as Noah's Row, or such a person as H. Turner, jun., be found at Hampton

(1) R. v. Taft, 1 Leach, 172; See R. v. Marshall, R. & R. 75.
(2) R v. Lockett, 1 Leach. 94; R. v. Abraham, 2 East P. C. 941.
(3) R. v. Taylor, 1 Leach, 214; R. v. Francis, R. & R. 209.

Court. Upon these facts the jury found the prisoner guilty, and he received judgment of death; but the execution of the sentence was respited on a doubt, whether, as Mr. Elliott had sworn that he gave credit to the prisoner, and not to the draft, it could amount to the crime of forgery. The twelve judges were unanimously of opinion that the conviction was right; for it was a false instrument, not drawn by any such person as it purported to be, and the using the fictitious name was only for the purpose of deceiving. (1)

In another case a conviction for forgery was held to be right, where the fictitious name used by the prisoner in the forged instrument was found by the jury to have been assumed by him with the intention of defrauding the prosecutor, although the prisoner's real name would, as admitted by the prosecutor, have carried with it as much credit as the assumed name. (2) But it was held that where a man, who had long been known by a fictitious name, drew a bill in that name, it was not a forgery. (3)

It is forgery for a person, having authority to fill up a blank acceptance or a cheque, for a certain sum, to fill it up for a larger amount. Therefore, if a person gives another a blank acceptance, and at the time limits the amount either by writing upon it, or otherwise, and, if in the filling up of the acceptance that amount be exceeded with intent to defraud the acceptor, or any other person, it is forgery under clause (*a*) of article 421. The following is a case of this kind. The prisoner was indicted for forging the following bill of exchange:

"London, August 20, 1836.

£500.

Two months after date pay to my order the sum of five hundred pounds, value received.

C. TAYLOR.

To the Rev. C. H. JENNER,

No. 1, Chesterfield street, May Fair."

It appeared that in consequence of an advertisement offering to lend money, Mr Jenner wrote, stating that he was anxious to borrow £500, and afterwards saw the prisoner, to whom he said he wanted money; the prisoner asked how much; Mr Jenner said £200, and some discussion arose as to Mr Jenner's means of repaying it. The prisoner said he had the money, and appointed to meet Mr Jenner the next day in London. Mr Jenner on the next day saw the prisoner, who took from his pocket-book a stamped piece of paper, and wrote something on the upper corner of it on the left hand, which Mr Jenner could not then distinguish, and which he handed to Mr Jenner, and requested him to write, on it, "accepted" and his name; which Mr Jenner did, and he also wrote on it "at the Bank of England," at the prisoner's desire. The prisoner said he should leave Mr Jenner for some purpose; Mr Jenner said "Then of course you will leave the check with me." The prisoner said that was unnecessary, and said 'To show you there can be nothing wrong there are the figures denoting £200 written in the corner." Mr Jenner then looked at the corner and observed written in the corner £200; which figures Mr Jenner stated must have been written before he wrote his acceptance. The prisoner then took the check away, and the parties were to meet at the bank coffee-house in half-an-hour. Mr Jenner went there, but the prisoner did not come. Mr Jenner stated that he never gave the prisoner any authority to fill up that paper for a greater sum than £200. Early in August the prisoner told one Edwards he had an acceptance of Mr Jenner's for £500 which he wished him to buy; and subsequently Edwards agreed to buy the bill for five shillings in the pound. He then saw it, and it

(1) R. v. Sheppard, 1 Leach, 226.
(2) R. v. Whiley, R. & R. 99. See also, R. v. Marshall, R. & R 75.
(3) R. v. Aickles, 2 East, P. C. 968; R. v. Bontein, R. & R. 260.

was perfectly blank, with the exception of the acceptance: there was a stamp on it, and he noticed a stain in the left hand upper corner. The prisoner afterwards produced the blank acceptance with the name C. Taylor as drawer, and C. Taylor as endorser. Nothing else was then written on it. Edwards then desired the prisoner to draw the body of the bill, which he did. It was proved that an acid had been used on that part of the paper where the stain was, and that an acid applied there would have the effect of discharging ink. The jury found the prisoner guilty, and they were of opinion that the figures denoting £200 were in the corner of the paper when taken away by the prisoner from Mr Jenner, and also that the authority to fill up the bill was confined to £200. Upon a case reserved, it was contended that the facts amounted only to a fraud, and did not constitute forgery, as the prisoner had authority to draw a bill, and a mere excess of authority was a fraud only, and not forgery; but the judges were unanimously of opinion that filling up the bill for £500, the prisoner having no authority beyond £200, was a false making of a bill for £500, and that the conviction was therefore right (1)

Filling in (without authority) the body of a blank check to which a signature is attached, 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 Bayley, 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, a though 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. (2)

If a person put the name of another on a bill of exchange as acceptor without the other's authority, expecting to be able to meet it when due, or expecting that such other person will overlook it, it is forgery. But if the person either had authority from such other person, or from the course of their dealings *bonâ fide* considered that he had such authority, it is not forgery. The prisoner was charged with forging, and with uttering a forged acceptance to the following bill of exchange:

"£25. Cheltenham, July 16th, 1834.

Three months after date pay to my order twenty-five pounds, for value received.

JOHN FORBES.

WILLIAM, PROSSER, jun., Esq., Cheltenham.

Accepted, payable at Messrs. Esdaile & Co., bankers, London.

WILLIAM PROSSER, jun."

The prisoner had paid away this bill, with the acceptance upon it, to a butcher to pay a debt of £4, and had taken the difference. Mr. Prosser proved that the acceptance was not in his handwriting, and that he had never given the prisoner authority to put his name on any bill or security of any kind. The prisoner was an architect engaged in building houses for Mr. Prosser, who had recommended the prisoner to raise money, which, when raised, the prisoner was to draw upon, under Mr. Prosser's superintendence, and it was sought on the part of the defence to raise an inference that he considered he had a right to use Mr. Prosser's name.

(1) R. v. Minter Hart, Mood, C. C. 486; 7 C. & P. 652: R. v. Wilson, 1 Den, 284; 2 C. & K. 527; See R. v. Richardson, 2 F, & F. 343.
(2) R. v. Wright, 1 Lew. 135.

Coleridge, J., said, "If the prisoner drew the bill mentioned in the indictment, and which he knew could not become due for some months after he did so, and then put Mr. Prosser's name on it, without his authority, either intending to meet it, or trusting that he should have money to do so, or trusting that Mr. Prosser would overlook it, the prisoner is guilty of forgery; but if you think that the state of affairs between the prisoner and Mr. Prosser was such that he had Mr. Prosser's authority to accept this bill, then it is not a forgery. If a person gives another leave to use his name on bills, and the person thus permitted writes the name of such person on a bill, this is, as it were, a signing by the person who gave the authority, although he had given no authority for the putting his name on that particular bill. The question which I shall leave to you is this, whether the name of Mr Prosser was put on the bill mentioned in the indictment without the authority of Mr. Prosser; or, was it written on the bill by the prisoner, under such circumstances that he might *bonâ fide* consider that he had Mr. Prosser's authority for so doing, as in the latter case you ought to acquit him." (1)

Nothing short of *bona fide* belief that the defendant had authority and a fair ground for that belief, from the acts of the party whose name is used, is sufficient. Thus where A. was indicted for forging and uttering an acceptance on a bill of exchange in the name of B., and B. admitted that he had had money transactions with A and had been connected with him as a partner in a hat manufactory and that they had had many bill transactions and had trusted each other largely, and that a mutual accomodation existed between them, Coleridge, J., in his summing up, said, "We now come to B's statement that he has been for the last eight years in habits of great intimacy with the prisoner and in partnership with him. Now, I put the question whether, though he had not authorized the signing of his name on that particular bill, he had ever given the prisoner a general authority. If he had said to the prisoner, 'You may use my name whenever you like,' it would be idle to say that the acceptance was a forgery. It is not merely writing another man's name, but writing it, without authority and with intend to defraud. But I go further: I think that if a person had reasonable ground for believing, from the acts of the party, that he had authority to accept and did in point of fact act on that, it would not be forgery. Let me suppose one or two cases:—Suppose the prisoner to have meant to raise £200 for two or three months, and trusted that at the end of that time he should be able to repay it, if he used another person's name, without authority and not believing that he had authority, that would be a distinct forgery. No man has a right to use another's name, trusting that he may be able to take up the bill. So, if a person having no authority were to say, 'I want to raise a sum of money, and I am sure my father is so fond of me that he will not proceed against me criminally,' and were to write his father's name to an acceptance, that would be forgery. No man has a right to trust to the kindness of another man. If you are of opinion that the prisoner acted in either of those ways, knowing that he had no authority but meaning to repay the bill or trusting that the prosecutor would not prosecute, in either of those cases, this would be forgery. There can be nothing short of the person believing that he had authority and having a fair ground for that belief from the other party. The authority need not be express; it may be implied from acts I put the question to see whether the prisoner had any reason for thinking that he had authority to use Mr. Woodman's name. Now, you are to judge whether you have any reason to believe, looking at the circumstances fairly between the crown and the prisoner, not stretching on one side or on the other, that the prisoner believed that he had authority, and from the circumstances had reasonable grounds for so believing. There was great intimacy between these parties: and there had been a great many dealings between them. All which is to be taken into account. You certainly find that, the moment Mr. Woodman is called upon, he does not pay the bill, and he does not in the least adopt the

(1) R. v. Forbes, 7 C. & P. 224. See R. v. Hill, 8 C & P. 274; R, v. Cooke, 8 C. & P. 582.

act that was done by the prisoner: that is really the only point in the case." (1)

It was at one time, considered that where the document was imperfect or such as would if genuine have no legal effect it would be no forgery; as, for instance, where a document was imperfect as a bill,—writing a name across it to be used as an acceptance, was held not to be a forgery of an acceptance: (2) and where a defendant was indicted for forging a will of lands, and the will was not one which purported to be attested by the legal number of witnesses, it was held that the defendant could not be convicted. (3) The same ruling was upheld in regard to a country bank note or bill of exchange, which, for want of a signature, was incomplete, and also in regard to a navy-bill payable in blank. (4) But there are decisions which seem to be in a different sense from the foregoing. For instance, it was held that a forgery might be committed of an instrument made on unstamped paper, notwithstanding that the particular instrument was subject to some law requiring it to be stamped; it being held in reference, for example to a bill of exchange, which under the English stamp acts required to be stamped, that such Acts declaring that a bill without a stamp should not be pleaded or given in evidence or be available in law or in equity, signified only that it should not be made use of to recover the debt. (5) And it was held that a man might be convicted of forging and uttering a bill of exchange although the name of the payee was not endorsed on it. (6) A man was also held indictable for forging a deed, though not made in pursuance of the provisions of particular statutes requiring it to be in a particular form. (7) And where a man forged an instrument which if genuine could not have been made available by reason of some circumstance not appearing upon the face of the instrument, but to be made out by some extrinsic evidence, he was held indictable for the forgery. (8)

It has been adjudged that the forgery of a protection in the name of A. B., as being a member of parliament, who in truth at the time was not a member, is as much an offence at common law, as if he were so. (9)

In a case where the defendant was convicted upon an indictment which stated that one Garbut and his wife were seized in fee of certain messuages, lands, and tenements, called Jawick, in the parish of Clacton, in Essex, and that the defendant intending to molest them, and their interest in the premises, forged a lease and release as from Garbut and his wife, whereby they were supposed for a valuable consideration to convey to him "all that park called Jawick, in the parish of Clacton, in Essex, containing eight acres in circumference, with all the deer, wood, &c., thereto belonging," it was moved in arrest of judgment, that the premises supposed to be conveyed were so materially different from those really belonging to Garbut and his wife, that it was impossible this conveyance could ever molest or disturb them. But the court held that it was not necessary, that there should be a charge, or a possibility of a charge, and that it was sufficient if it were done with such intent, and that the jury had found that it was done with intent to molest Garbut and his wife in the possession of their land. (10)

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(1) R. v. Beard, 8 C. & P. 143.
(2) R. v. Cooke, 8 C. & P. 582; R. v. Butterwick, 2 M. & R. 196.
(3) R. v. Wall, 2 East, P. C. 953. See also, R. v. Moffatt, 1 Leach, 431.
(4) R. v. Richards, R. & R. 193; R. v. Randall, R. & R. 195; R. v. Pateman, R. & R. 455; R. v. Burke, R. & R. 496; R. v. Turpin, 2 C. & K. 820; R. v. Harper, 7 Q. B. D. 78; 50 L. J. (M. C.) 90.
(5) R. v. Hawkeswood, 2 T. R. 606; 1 Leach, 257; 2 East, P. C. 955; See R. v. Lee, 1 Leach, 258, and R. v. Lyons, R. & R. 255; R. v. Froud, R. & R. 389; R. v. Morton, 2 East, P. C. 955; R. v. Pike, 2 Moo. C. C. R. 70; R. v. Reculist, 2 Leach, 703.
(6) R. v. Wickes, R. & R. 149.
(7) R. v. Lyon, R. & R. 255.
(8) R. v. McIntosh, 2 Leach, 833; 2 East, P. C. 942.
(9) R. v. Deakin, 1 Sid., 142; 2 East, P. C. 948.
(10) R. v. Crooke, 2 Str. 901; 2 East, P. C. 921.

Where an indictment was for forgery at common law of a surrender of the lands of J. S., and it was not shown in the indictment that J. S. had any lands, it was holden upon motion in arrest of judgment that the indictment was good, upon the principle that it was not necessary to show that the party was prejudiced, the intent to prejudice being sufficient. (1)

It was held, in several cases, that forgery might be committed by the false making of an instrument, purporting to be the will of a person still living; notwithstanding the objection, that during the life of a party his will is ambulatory, and can have no validity as a will until his death. Thus, a prisoner was convicted for forging the will of a seaman, who it appeared was still alive, and had returned to England two years after the prize money had been received by the prisoner, under the forged will. (2) In a subsequent case, where the prisoner was indicted and convicted for forging the last will and testament of a woman who was still living, and was a witness on the trial, the judgment was respited upon a doubt, whether as the supposed testatrix was living, the prisoner was legally convicted of having forged her *last will* and testament; there being no such instrument as a last will and testament in contemplation of law, until after the death of the person making it; but the judges were unanimously of opinion, that an instrument may be the subject of forgery, although in fact it should appear impossible for such an instrument as the instrument forged to exist, provided it purports on the face of it to be good and valid, as to the purposes for which it was intended to be made. (3) The point was again referred to the consideration of the judges, in a case where the prisoner was indicted and convicted for knowingly uttering and publishing as true, a certain false and forged will of one J. G., late a seaman belonging to a merchant vessel, and it appeared, that the said J. G. was living. All the judges held the conviction right. It was observed by the learned judge, who delivered their opinion, that every will must be made in the lifetime of the party, whose will it was; that it existed as a will in his lifetime, though not to take effect till his death; that the making a false instrument importing on the face of it to be a will was equally forgery, whether the person whose will it purported to be were dead or alive, at the time of making it; that a contrary doctrine would operate as a repeal of the law; for if the act of making the will were not forgery at the time, a publication afterwards would not make it so. Buller, J., thought the very definition of forgery decided the doubt, for it was the making a false instrument with intent to deceive; and that here the intention to deceive had been established by the jury, and the instrument purporting to be a will was clearly false. (4)

On an indictment for forging a will the probate of that will unrevoked is not conclusive evidence of its validity so as to be a bar to the prosecution. (5)

A prisoner was convicted of forging a will of a non-existing person. He was indicted for forging the will of Jane Warner, and it appeared that there was no such person; on which it was objected that the forgery of the will of a non-existing person was no forgery. Patterson, J., "There is nothing to limit the offence to the forgery only of the wills of persons that have existed." (6)

There can, no longer, be any doubt that imperfections and defects in a forged document will not enable the forger to escape punishment; for clause 4 of article 422 expressly declares that the forgery is complete, although the false document may be incomplete or may not purport to be such a document as would be binding in law, if it be so made as to be acted on as genuine, and is such as to indicate that it was intended to be acted on as genuine

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(1) Goates case 1 Ld. Raym. 737.
(2) R. v. Murphy, 10 Hargr. St. Tr. 183; 2 East P. C. 949.
(3) R. v. Sterling, 1 Leach, 99.
(4) R. v. Coogan, 1 Leach, 449.
(5) R. v. Buttery and Macnamara, R. & R. 342.
(6) R. v. Avery, 6 C. & P. 596.

423. Punishment of forgery.—Every one who commits forgery of the documents hereinafter mentioned is guilty of an indictable offence and liable to the following punishment :—

(*A.*) **To imprisonment for life,**—if the document forged purports to be, or was intended by the offender to be understood to be or to be used as —

(*a.*) any document having impressed thereon or affixed thereto any public seal of the United Kingdom or any part thereof, or of Canada or any part thereof, or of any dominion, possession or colony of Her Majesty ; 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 hereditament, or to any interest in or to any charge upon any land or hereditament, or evidence of the creation, transfer or extinction of any such interest or charge ; or

(*d.*) any entry in any register or book, or any memorial or other document made, issued, kept or lodged under any Act for or relating to the registering of deeds or other instruments respecting or concerning the title to or any claim upon any land or the recording or declaring of titles to land ; R.S.C., c. 165, s. 38 ; or

(*e.*) any document required for the purpose of procuring the registering of any such deed or instrument or the recording or declaring of any such title ; R.S.C., c. 165, s. 38 ; or

(*f.*) any document which is made, under any Act, evidence of the registering or recording or declaring of any such deed, instrument or title ; R.S.C., c. 165, s. 38 ; or

(*g.*) any document which is made by any Act evidence affecting the title to land ; or

(*h.*) any notarial act or document or authenticated copy or any *procès-verbal* of a surveyor or authenticated copy thereof ; R.S.C., c. 165, s. 38 ; or

(*i.*) any register of births, baptisms, marriages, deaths or burials authorized or required by law to be kept, or any certified copy of any entry in or extract from any such register ; R.S.C., c. 165, s. 43 ; or

(*j.*) any copy of any such register required by law to be transmitted by or to any registrar or other officer ; R.S.C., c. 165, s. 44 ; or

(*k.*) any will, codicil or other testamentary document, either of a dead or living person, or any probate or letters of administration, whether with or without the will annexed ; R.S.C., c. 165, s. 27 ; or

(*l.*) any transfer or assignment of any share or interest in any stock, annuity or public fund of the United Kingdom or any part thereof, or of Canada or any part thereof, or of any dominion,

possession or colony of Her Majesty, or of any foreign state or country, or receipt or certificate for interest accruing thereon; R.S.C., c. 165, ss. 8 and 25; or

(*m.*) any transfer or assignment of any share or interest in the debt of any public body, company or society, British, Canadian or foreign, or of any share or interest in the capital stock of any such company or society, or receipt or certificate for interest accruing 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 any such stock, interest or share, or to any dividend or interest payable in respect thereof; R.S.C., c. 165, s. 11; or

(*q.*) any exchequer bill or endorsement thereof, or receipt or certificate for interest accruing thereon; R.S.C., c. 165, s. 13; or

(*r.*) any bank note or bill of exchange, promissory note or cheque or any acceptance, endorsement or assignment thereof; R.S.C., c. 165, ss 18, 25 and 28; or

(*s.*) any scrip in lieu of land; R.S.C. c. 165, s. 13; or

(*t.*) any document which is evidence of title to any portion of the debt of any dominion, colony, or possession of Her Majesty, or of any foreign state, or any transfer or assignment thereof; or

(*u.*) any deed, bond, debenture, or writing obligatory, or any warrant, order, or other security for money or payment of money, whether negotiable or not, or endorsement or assignment thereof; R.S.C., c. 165, ss. 26 and 32; or

(*v.*) any accountable receipt or acknowledgment of the deposit, receipt, or delivery of money or goods, or endorsement or assignment thereof; R.S.C., c. 165, s. 29; or

(*w.*) any bill of lading, charter-party, policy of insurance, or any shipping document accompanying a bill of lading, or any endorsement or assignment thereof;

(*x.*) any warehouse receipt, dock warrant, dock-keeper's certificate, delivery order, or warrant for the delivery of goods, or of any valuable thing, or any endorsement or assignment thereof; or

(*y.*) any other document used in the ordinary course of business as proof of the possession or control of goods, or as authorizing,

either on endorsement or delivery, the possessor of such document to transfer or receive any goods.

(*B.*) **To fourteen years' imprisonment,**—if the document forged purports to be, or was intended by the offender to be understood to be, or to be used as—

(*a.*) any entry or document made, issued, kept or lodged under any Act for or relating to the registry of any instrument respecting or concerning the title to or any claim upon, any personal property; R.S.C., c. 165, s. 38.

(*b.*) any public register or book not hereinbefore mentioned appointed by law to be made or kept, or any entry therein. R.S.C., c. 165, s. 7.

(*C.*) **To seven years' imprisonment,**—if the document forged purports to be, or was intended by the offender to be understood to be, or to be used as—

(*a.*) any record of any court of justice, or any document whatever belonging to or issuing from any court of justice or being or forming part of any proceeding therein ; or

(*b.*) any certificate, office copy, or certified copy or other document which, by any statute in force for the time being, is admissible in evidence; or

(*c.*) any document made or issued by any judge, officer or clerk of any court of justice, or any document upon which, by the law or usage at the time in force, any court of justice or any officer might act ; or

(*d.*) any document which any magistrate is authorized or required by law to make or issue ; or

(*e.*) any entry in any register or book kept, under the provisions of any law, in or under the authority of any court of justice or magistrate acting as such ; or

(*f.*) any copy of any letters patent, or of the enrolment or enregistration of letters patent, or of any certificates thereof; R.S.C., c. 165, s. 6 ; or

(*g.*) any license or certificate for or of marriage ; R.S.C., c. 165, s. 42 ; or

(*h.*) any contract or document which, either by itself or with others, amounts to a contract, or is evidence of a contract ; or

(*i.*) any power or letter of attorney or mandate ; or

(*j.*) any authority or request for the payment of money, or for the delivery of goods, or of any note, bill, or valuable security ; R.S.C., c. 165, s. 29; or

(*k.*) any acquittance or discharge, or any voucher of having received any goods, money, note, bill or valuable security, or any

instrument which is evidence of any such receipt; R.S.C., c. 165, s. 29; or

(*l.*) any document to be given in evidence as a genuine document in any judicial proceeding; or

(*m.*) any ticket or order for a free or paid passage on any carriage, tramway or railway, or on any steam or other vessel; R.S.C., c. 165, s. 33; or

(*n.*) any document other than those above mentioned; R.S.C., c. 165, s. 76.

It is not necessary to set out in the indictment a copy or facsimile of the forged document; (See article 613 *post*); but the indictment should state what the instrument is in respect of which the forgery was committed; (1) and the instrument should be correctly described. For instance, if a bill of exchange is described as a promissory note, the indictment will be defective, unless amended. (2)

If the document be set out in the indictment, it should, when given in evidence, correspond exactly with that set out in the indictment, or the variance, if not amended, may be fatal. (3)

A mere literal variance, however, (that is, where the omission or addition of a letter does not alter or change a word, so as to make it another word), will not be material; (4) as, for instance, "receivd" for "received"; (5) "undertood" for "understood"; (6) "Messes" for "Messrs" (7) or the like.

Attaching to the paper or parchment, on which the indictment is written, impressions of forged notes taken from engraved plates, is not a legal mode of setting out the notes in the indictment. (8)

If the instrument forged be in a foreign language, it should, (if it be set out at all), be set out in that language, and a complete and accurate translation should also be set out. (9)

Counts under the repealed statute 2 & 3 W. 4, c. 123, s. 3, stating the plates to have engraved on them, in the Polish language, a promissory note for the payment of money, to wit, for the payment of five florins, purporting to be a promissory note for the payment of money of a certain foreign prince, without stating the English value, were held good after verdict, by virtue of 7 G. 4, c. 64, s. 21. (10)

PROOF.—That the signature or other part of the instrument alleged to be forged is not of the handwriting of the party may be proved by any person acquainted with his handwriting, either from having seen him write, or from being in the habit of corresponding with him. (11) It is sufficient, *primâ facie*, to disprove his

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(1) R. v. Wilcox, R. & R. 50.
(2) R. v. Hunter, R. & R. 511; R. v. Birkett, R. & R. 251.
(3) R. v. Powell, 2 East, P. C. 976.
(4) R. v. Drake, 2 Salk, 661.
(5) R. v. Hart, 1 Leach, 145; 2 East, P. C. 977.
(6) R. v. Beach, Cowp. 229.
(7) R. v. Oldfield, 1 Russ. 376.
(8) R. v. Harris, R. v. Moses, R. v. Balls, 7 C. & P. 429; R. v. Warshaner, 1 Mood, C. C. 466.
(9) See R. v. Szudurskie, 1 Mood. C. C. 419; R. v. Warshaner, Id. 466; R. v. Harris, 7 C. & P., 416, 429.
(10) R. v. Warshaner, R. v. Harris, *supra*.
(11) Garrells v. Alexander, 4 Esp. 37; Gould v. Jones, 1 W. Bl. 384; Harrington v. Fry, R. & M. 99; R. v. Horn Tooke, 25 How. St. Tr. 71, 72.

handwriting, and he need not be called to disprove an authority to others to use his name. (1)

The party himself whose name is forged may be a witness to prove the forgery. But the forgery may equally be proved by other witnesses who are acquainted with his handwriting, without calling him as a witness. (2)

By article 698, *post*, "comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine, shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute."

It seems that the disputed writing and the writing whose genuineness is proved should not be left to the jury direct, in order that by their own comparison of the two writings they may draw their own *unaided* conclusions, but that they must be assisted by the evidence of an expert. (3).

A person skilled in the detection of forgeries may be examined to prove that the writing is in a feigned hand, though he never saw the party write (4).

On an indictment for uttering a forged will, which, it was alleged had been written over pencil marks, that had been rubbed out, it was held that the evidence of engravers, who had examined the paper with a mirror, and traced the pencil marks, was admissible for the prosecution. (5)

No person accused of forgery, under article 423, can be convicted upon the uncorroborated evidence of one witness. (See article 684, *post*.)

Evidence must also be given of the identity of the party whose handwriting is alleged to be forged; that is, it must be proved, expressly, or from circumstances, that the alleged forgery was intended to represent the handwriting of the person whose handwriting it is proved not to be; or that it was intended as the handwriting of a person who never existed. (6)

Where the defendant uttered a forged note, and said that it was drawn by W. H. of the Bull's Head, it was held to be sufficient to prove, that it was not of the handwriting of *that* W. H., although it appeared that there was another W. H. living in the neighborhood. (7)

It was at one time doubted whether the forgery, in England, of an instrument payable abroad, or the uttering, in England, of an instrument forged and payable abroad, was an offence within some of the repealed statutes; (8) although it was afterwards decided that it was. (9)

This doubt was removed by the Imperial statute, 11 Geo. 4, and 1 Will. 4, c. 66, s. 30, which was re-enacted in sec. 40 of 24 and 25 Vic., c. 98; and our article 422, *ante*, expressly declares that the making of a false document is forgery, whether the person intended to be affected is within Canada or not; and article 424, *post*, which deals with uttering, says that it is immaterial where the document was forged.

Forgery of bills of exchange, promissory notes, etc.—(Art. 423 A *r*). A bill payable ten days after sight purporting to be drawn upon the commis-

(1) R. v. Harley, 2 M. & Rob. 473.
(2) R. v. Hughes, 2 East, P. C. 1002; R. v. Macguire, Id., R. & R. 378.
(3) See R. v. Harvey, 11 Cox, 546.
(4) R. v. Cator, 4 Esp. 117; 1 Esp. 14; Goodtitle v. Braham, 4 T. R. 497; Gurney v. Langlands, 5 B. & Ald. 330; R. v. Buckler, 5 C. & P. 118; Doe v. Suckermore, 5 A. & E. 703; 2 Nev. & Per. 16.
(5) R. v. Thomas Williams, 8 C. & P. 434.
(6) See R. v. Sponsonby, 2 East, P. C. 996, 997; R. v. Downes, *Id.* 997.
(7) R. v. Hampton, 1 Mood. C. C. 255.
(8) R. v. Dick, 1 Leach, 68; R. v. McKay, R. & R. 71.
(9) R. v. Kirkwood, 1 Mood. C. C. 311.

sioners of the navy, by a lieutenant, for the amount of certain pay due to him, has been held to be a bill of exchange. (1) And a note promising to pay A. and B. "*stewardesses*" of a Benefit Society, "*or their successors*," a certain sum, on demand, was held to be a promissory note, although the society was not duly enrolled according to law, it not being necessary that the note should be negociable. (2)

An instrument drawn by A. on B. requiring him to pay to the administrators of C. a certain sum of money at a certain time, *without acceptance*, is a bill of exchange, and may be so described in the indictment. (3)

Even when there is no person named in the draft as drawee, the defendant may be indicted for uttering *a forged acceptance on a bill of exchange*. (4) But it has been held that such an instrument containing the name of no drawee and containing no acceptance was not a bill of exchange. (5) It has also been held that, where, at the time of forging an acceptance, the bill bore no signature of a drawer, it was not a bill of exchange. (6)

In the case of a document in the ordinary form of a bill of exchange, but requiring the drawee to pay to *his own* order, and purporting to be endorsed by the drawer and accepted by the drawer, it has been held that it could not, in an indictment for forgery, be treated as a bill of exchange. (7)

A seaman's advance note purporting to be signed by the master and owner, and in the following form,—"Ten days after the ship sails from the port of L., the undersigned hereby promise and agree to pay to any person who shall advance £4 to H., on this agreement, the sum of £4, provided that the said H. shall sail in the said ship from the said port of L.," was held not to be a promissory note. (8)

But, although, in an indictment for forgery, a document like those above mentioned may not be properly described as a bill of exchange or promissory note, an indictment for the forgery of such a document would lie under clause C (*n*), which covers all documents not provided for by the other clauses of article 423; and, therefore, where there is any doubt as to the alleged forgery being a bill of exchange *or* a promissory note, a separate count should be framed describing or setting out the instrument so as to bring it within clause C (*n*).

An instrument payable to the order of A., and directed "At Messrs P. & Co., Bankers," was held to be properly described as a bill of exchange. (9)

The adding of a false address to the name of the drawee of a bill, while the bill is in course of completion, in order to make the acceptance appear to be that of a different existing person, was held to be a forgery. (10) And so was the adding of an address to a bill so as to make it appear that the acceptance, though written by a person of the same name, is that of a different person, whether such person existed or not. (11)

An indictment charged that the defendant forged "a certain endorsement *of*" a bill of exchange, "which said forged endorsement" was as follows:—"Magdalene Isherwood;" and the bill as set out in the indictment and as proved in

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(1) R. v. Chisholm, R. & R. 297.
(2) R. v. Box, 6 Taunt. 325; R. & R. 300. See R. v. McKeny, 1 Mood. C. C. 130.
(3) R. v. Kinnear, 2 M. & Rob. 117.
(4) R. v. Hawkes, 2 Mood. C. C. 60.
(5) R. v. Curry, 2 Mood. C. C. 218.
(6) R. v. Mopsey, 11 Cox, 143. See also R. v. Harper, 7 Q. B. D. 78; 50 L. J. (M. C.) 90.
(7) R. v. Bartlett, 2 M. & Rob. 362.
(8) R. v. Howie, 11 Cox, 320.
(9) R. v. Sidney Smith, 2 Mood. C.C. 295. See Gray v. Milner, 8 Taunt. 739.
(10) R. v. Blenkinsop, 1 Den. 275; 2 C. & K. 531; 17 L. J. (M. C.) 62.
(11) R. v. Epps, 4 F. & F. 85.

evidence was payable to four persons of whom Magdalene Isherwood was one), as joint executrices. *Held*, by all the judges, that the indictment was sufficient, and that the charge was proved. (1)

Deeds, bonds, debentures, etc.—(Art. 423 A. *u*). A power of attorney to transfer government stock has been held to be a deed. (2) But the forging of such a power of attorney is the subject of a distinct provision contained in clause A (*o*) of article 423.

The giving of an administration bond, in a false name, is a forgery. (3)

Warrants or orders, etc., for money, etc.—(Art. 423 A *u*). It is not necessary that a document, in order to constitute it a warrant or order for the payment of money, should appear to be so on its face. It is sufficient if the party to whom it is addressed has been in the habit of treating similar documents as warrants, etc., for the payment of money. Therefore, a document in the form of a mere receipt, given by a depositor to a building society that received money on deposit, may properly be described in an indictment, as a warrant for payment of money, if, by the custom of the society, such receipts are, in fact, treated as warrants for the payment of money. (4)

A draft upon a banker has been held to be a warrant and order for the payment of money, (5) although post-dated. (6) So was even a bill of exchange; (7) and an order to pay "all my prize money due to me for my services on board His Majestys' Ship *Leander*," without specifying any particular sum. (8)

Where the instrument was an order to pay the prisoner, or order, the sum of £4. 5s. being a month's advance on an intended voyage to Quebec in the ship "Mary Ann" as per agreement with G. M. master; and the prisoner had written in the margin of the order, "On receiving this cheque I agree to sail, and to be on board within sixteen days from the date of this cheque;" it was held an order for the payment of money. (9)

A foreign letter requesting a correspondent in England to advance money, it being proved that such letters are, in the course of business, treated as orders, was held to support a charge of forging an order for the payment of money. (10)

A writing, purporting to authorize the bearer to receive money deposited in a bank by a friendly society, and purporting to be signed by the principal officers of the society, (the bank having received the money on terms of repayment to the order of the society), was held to be well described as a warrant for the payment of money, and it was held no objection that the defendant was himself a member of the society. (11)

A forged paper was as follows:—"This is to certify R. R. has swept flues and cleaned the bilges, and repaired four bridges of the *Princess Victoria*. J. N £4. 0s. 10;" and it was proved that, by the course of dealing between the parties, this voucher, if genuine, would have authorised L. & Co. to pay the £4. 0. 10. *Held*, sufficient to support an indictment charging it as a warrant for the payment of money. (12) But a paper reading as follows:—"I hereby

(1) R. v. Winterbottom 1 Den. 41; 2 C. & K. 37; Arch. Cr. Pl. & Ev. 21 Ed. 667.
(2) R. v. Fauntleroy, 1 Mood. C.C. 52; 2 Bing 413; 1 C. & P. 421.
(3) R. v. Barber, 1 C. & K. 434.
(4) R. v. Kay, L. R., 1 C. C. R. 257; 39 L. J. (M. C.) 118.
(5) R. v. Willoughby, 2 East, P. C. 944.
(6) R. v. Taylor, 1 C. & K. 213.
(7) R. v. Sheppard, 1 Leach 226; R. v. Smith, 1 Den. 79.
(8) R. v. McIntosh, 2 East, P. C. 942.
(9) R. v. Bamfield, 1 Mood. C. C. 417. See R. v. Anderson, 2 M. & Rob. 469; and R. v. Howie, 11 Cox 320.
(10) R. v. Raake, 2 Mood. C. C. 66; 8 C. & P. 626.
(11) R. v. Harris, 2 Mood. C. C. 267; 1 C. & K. 179.
(12) R. v. Rogers, 9 C & P. 41.

certify that the within named W. M. is gaining his living by hawking," the production of which was necessary to enable the defendant to obtain payment of a sum of money,—was held not to be a warrant or order for the payment of money, and to be the subject only of forgery at common law. (1)

Money orders issued by the Post-Office have been held to be warrants and orders for the payment of money. (2)

A writing in the form of a bill of exchange but without any drawee's name cannot be charged as an order for the payment of money; at least unless shewn by averments to be such. (3)

A forged draft on a banker, in a fictitious name, or in the name of a person who never kept cash with the banker is a warrant or order for the payment of money; for it imports, upon the face of it to be an order by a person having authority to make it. (4)

A forged draft in the name of a person who *does* keep cash with the banker is an order, whatever be the state of that person's account at the time. (5)

Where, on the contrary a man obtains goods upon his own draft on a banker, with whom he *does not* keep cash, the proper mode of proceeding against him criminally is by indictment for the false pretence. (6)

The cases on this subject were all considered by the judges in R. v. Vivian, (7) in which they laid down the principle that any instrument for the payment of money under which, if genuine, the payer might receive the amount against the party signing it, might properly be considered as a *warrant* for the payment of money; and that it was equally such, whatever were the state of account between the parties, and whether the party purporting to sign it had at the time funds in the hands of the party to whom it was addressed or not. In that case the forged instrument was as follows:—"Mr M. will be pleased to send by the bearer £10 on Mr H's account, as Mr H. is very bad in bed, and cannot come himself." Signed "M. R., foreman, St. A. foundry." M. was a clerk of bankers, with whom H. kept an account, and by drafts on whom he paid his workmen. M. R. was H's foreman, having authority to pay the workmen, but not to draw for the money. H. being ill in bed, the defendant forged this paper in M. R's name, and obtained the £10 from M. by means of it. Although M. R. had, himself, no account with the bankers the defendant was held properly convicted; because by the instrument, if genuine, M. R. said in effect that he had authority from H., who had an account with the bankers; and as against him (M. R.), therefore, it was as much a warrant as if he himself had such account, and would equally have bound him.

It has been held that a warrant for the payment of money need not be addressed to any particular person; but that it was sufficient if it would, if genuine, have been an authority to a certain person to pay the account mentioned in it: (8) and where the forged instrument was thus, "Sir, please pay," *etc.*, it was held that it might be shewn by evidence to be an order for the payment of money, and for whom it was intended. (9)

A written promise to pay a specified sum or such other sum not exceeding

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(1) R. v. Mitchell, 2 F. & F. 44.
(2) R. v. Gilchrist, 2 Mood. C. C. 233; C. & Mar. 224.
(3) R. v. Curry, 2 Mood. C. C. 218.
(4) R. v. Lockett, 2 East, P. C. 840; 1 Leach, 94: R. v. Abraham, 2 East P. C. 941.
(5) R. v. Carter, 1 Den. C. C. 65: 1 C. & K. 741.
(6) See R. v. Lara, 6 T. R. 565, R. v. Flint, R. & R. 460; R. v. Jackson, 3 Camp. 370: and see p. 320, *ante*.
(7) R. v. Vivian, Den. 35; 1 C. & K. 719.
(8) R. v. Rogers, 9 C. & P. 41.
(9) R. v. Snelling, Dears 219: 23 L. J. (M. C.) 8.

the same, as A. B. may incur by reason of his sureyship is an *undertaking* for the payment of money. (1) So, also, is a document purporting to guarantee a master a certain amount in money against the dishonesty of a clerk; (2) and an I. O. U. given by a debtor to his creditor, to obtain further time for payment of the debt, to which I. O U. the debtor affixes, besides his own signature, a forged signature of a third party as surety. (3)

A sailor's *shipping note* purporting to be signed by the master, and reading as follows.—"In consideration of F. sailing as steward in the brig K. from the port of L., I undertake to pay to F., or bearer, £2 five days after the said brig shall sail from the said port," is an *undertaking*. (4)

Accountable receipts.—(Art. 423 *n.*) It has been held that a pawnbroker's ticket or duplicate is an accountable receipt for goods (5)

If a person with intent to defraud and to cause it to be supposed, contrary to the fact, that he has paid a certain sum into a bank, make in a book, purporting to be a pass-book of the bank, a false entry, which denotes that the bank has received the sum, he is guilty of forging an accountable receipt for money. (6)

Warrants for the delivery of goods, etc.—At the London Docks a person bringing a "*tasting order*" from a merchant having wine there, is not allowed to taste until the order has across it the signature of a clerk of the company. The defendant uttered a tasting order with the merchant's name forged to it by presenting it to the company's clerk for his signature across it, which the clerk refused. It was held to be, in this state, a forged order for the delivery of goods. (7)

An order "to deliver my work to bearer" (and which, in evidence, was explained to mean an order to Goldsmith's Hall to deliver certain plate which a silversmith had sent there to be marked), was held to be a warrant or order for the delivery of goods. (8)

Requests for payment of money, or delivery of goods, etc.—(Art. 423, C *j*). It has been held that a *request* for the delivery of goods need not be addressed to any one; (9) and that it need not be signed by a person who can compel a performance of it, or who has any authority over or interest in the goods. (10)

Where the prisoner represented that M. C. was dead, and had left £50 or £60, which was in the hands of A. D., and that he wanted mourning, and brought a forged paper purporting to be signed by A. D., and containing the following:—"Please let W. T. have such things as he wants for the purpose; I have got the amount of £27 for M. C. in my keeping these many years,"—it was held to be a forged request for goods. (11)

A paper which contained the following:—"Please let the lad have a hat, and I will answer for the money, E. B."—was held to be a *request* for the delivery

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(1) R. v. Reed, 2 Mood. C. C. 62 : 8 C. & P. 623.
(2) R. v. Joyce, L. & C. 576; 34 L. J. (M. C. 168.
(3) R. v. Chambers, L. R., 1 C. C. R. 341; 41 L. J. (M. C.) 15.
(4) R. v. Anderson, 2 M. & Rol. 469. See also R. v. Howie, 11 Cox 320; and R. v. Bamfield, 1 Mood. C. C. 417
(5) R. v. Fitchie, Dears. & B. 175; 26 L. J. (M. C.) 90.
(6) R. v. Moody, L. & C. 173; 31 L. J. (M. C.) 156; R. v. Smith, L. & C. 168; 31 L. J. (M. C.) 154.
(7) R. v. Illidge, 1 Den. C. C. 404; 2 C. & K. 871.
(8) R. v. Jones, 1 Leach, 53.
(9) R. v. Carney, 1 Mood. C. C. 351; R. v. Cullen, 1 Mood. C. C. 300; R. v. James, 8 C. & P. 292; R. v. Pulbrook, 9 C. & P. 37.
(10) R. v. Thomas, 2 Mood C. C. 16.
(11) R. v. Thomas, 7 C. & P. 851.

of goods; and it was also held that it was not the less a forged request for the delivery of goods because it might also be a forged *undertaking* for the payment of money. (1)

A letter written to a wholesale house in London in the name of a customer in the country, as follows:—"I shall feel obliged by your paying Mr. B. the sum of £2 7s. 8d., and debiting me with the same; you will please have a receipt, and add the amount to invoice of order on hand,"—was held to be a request for the payment of money. (2)

Acquittances, receipts, etc.—(Art. 423 C *k*). The difference between the receipts covered by this clause and the accountable receipts or acknowledgements dealt with in clause A. (*v*) seems to be this, that, in the one case (clause A. *v*) the receipt is for money or goods deposited with and left in charge of the person receiving the same, and to be accounted for, while, in the other, it is merely a receipt for money or goods in the nature of an acquittance or discharge. For instance when A., a banker, receives a deposit of money from B., a depositer, A's receipt is an accountable receipt for money which he takes charge of for B., to whom he must account for it; but when B., in afterwards withdrawing the money so deposited with A. gives a receipt for it, B's receipt is then a mere acquittance or discharge.

A turnpike toll-gate ticket is a receipt for money. (3)

Where it was shewn to be the custom of bankers to give, on deposits of money, receipts in the following form,—"Received of A. B. £85 to his credit. This receipt not transferable;" and to repay the same with interest, on the return of the receipt with a name written on it; it was held that the forging the name of A., B., and receiving the money due, on its return, was a forging and uttering of an acquittance for the £85 and interest. (4)

424. Uttering forged documents.—Every one is guilty of an indictable offence who, knowing a document to be forged, uses, deals with, or acts upon it, or *attempts to use*, deal with, or act upon it, or causes or *attempts to cause* any person to use, deal with, or act upon it, as if it were genuine, and is liable to the same punishment as if he had forged the document.

2. It is immaterial where the document was forged.

The mere shewing of a forged *receipt* to a person with whom the defendant was claiming credit for it has been held to be an uttering, although the defendant refused to part with the possession of it. (5)

Where a pawnbroker, upon the hearing of an application against him under 39 & 40 Geo. 3, c. 99, s. 14, to compel him to deliver up goods pledged with him, (the money advanced, with interest, having been repaid) produced and delivered to the magistrates, through the hand of his attorney, a forged duplicate, as the genuine one which he had given when the goods were pledged, and which he had received back when the money was repaid, it was held to be an uttering by the pawnbroker. (6)

A placed a forged receipt for poor-rates in the hands of B., for the purpose of inspection only, in order by representing himself as a person whose poor-rates, were paid, to fraudulently induce B. to advance money to C., for whom he, A.,

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(1) R. v. White, 9 C. & P. 282.
(2) R. v. Thorn, 2 Mood. C. C. 210; C. & Mar. 206. See, also, R. v. Roberts, 2 Mood. C. C. 258; C. & Mar. 652.
(3) R. v. Fitch, R. v. Howley, L. & C. 159.
(4) R. v. Atkinson, 2 Mood. C. C. 215; C. & Mar. 325.
(5) R. v. Radford, 1 Den. 59: 1 C. & K. 707.
(6) R. v. Fitchie, Dears. & B. 175; 26 L. J. (M. C.) 90.

proposed to become surety for its repayment. *Held* to be an uttering: the rule there laid down by the Court being that a using of the forged instrument in some way, in order to get money or credit on it, *or by means of it*, is sufficient to constitute the offence of uttering. (1)

On an indictment for uttering forged bonds in England; it was held that such uttering was sufficiently proved by evidence of the bonds having been posted in England to a firm at Brussels for negociation. (2)

The giving of a forged note to an innocent agent, or to an accomplice is a disposing of and putting away of the note. (3)

Where several, by concert, were privy to the uttering of a forged note, which was uttered by one only in the absence of the others, he who uttered it was held to be a principal, and the others, accessories before the fact. (4) But, now, they would all be principals. (See articles 61 and 62 pp. 35 and 36, *ante*.)

A *conditional* uttering is as much a crime as any other. Where the defendant gave a forged acceptance, knowing it to be so, to the manager of a bank where he kept an account, saying that he hoped this bill would satisfy the bank as a security for the money he owed them, and the manager replied that that would depend on the result of enquiries as to the acceptors; this was holden a sufficient guilty uttering. (5)

The using, dealing with or acting upon the document knowing it to be a forgery constitutes the offence, under this article 424.

The guilty knowledge of the document being forged is, in nearly all cases, proved by evidence of facts from which the jury may presume it.

Upon an indictment for uttering a forged bank-note, knowing it to be forged, proof that the defendant had passed other forged notes, when proved by legitimate evidence, was held to raise a probable presumption that he knew the particular note in question to be forged. (6) And, if, in addition to this, it be proved also that the defendant, when he passed the notes, gave a false name or a false address, it will amount to a violent presumption.

Even where the uttering by the defendant of other forged notes is the subject of a distinct indictment, the evidence has been admitted. In one case, in which authorities against the admissibility of such evidence were cited, Lord Denman, C. J. said that he "could not conceive how the relevancy of the fact to this charge could be affected by its being the subject of another charge." (7)

In another case Alderson, B. admitted such evidence. (8)

On an indictment for engraving or uttering notes of a foreign prince, evidence of a recent engraving or uttering of notes of another foreign prince was held admissible in proof of guilty knowledge (9)

Where it appeared that the defendant sold a forged note to an agent employed

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(1) R. v. Ion, 2 Den. 475 : 23 L. J. (M. C.) 166.
(2) R. v. Finkelstein, 15 Cox, 107.
(3) R. v. Palmer, 1 N. R. 93; R. & R. 72; R. v. Giles, 1 Mood. C. C. 166.
(4) R. v. Soares, R. & R. 25 : R. v. Badcock, R. & R. 249; R. v. Stewart, R. & R. 363; R. v. Davis, R. & R. 113; R. v. Morris, R. & R. 270; 2 Leach, 1096; R. v. Harris, 7 C. & P. 416.
(5) R. v. Cooke, 8 C. & P. 582
(6) R v. Millard, R. & R. 245; R. v. Moore, 1 F. & F. 73; R. v. Wylie, 1 N. R. 92; R. v. Tattersal, 1 N. R. 94; R. v. Ball, 1 Camp. 324; R. & R. 132; R. v. Hough, R. & R. 120; R. v. Green, 3 C. & K. 209; R. v. Salt, 3 F. & F. 834; R. v. Colclough, 15 Cox, (Ir. C. C R.) 92.
(7) R. v. Cadwallader, Lewis, Carnarvon Sum. Ass 1840.
(8) R. v. Acton, 1 Russ. 407. See, also, R. v. Foster, Dears. 456; 24 L. J. (M. C.) 134.
(9) R. v. Balls, 1 Mood. C. C. 470; 7 C. & P. 429.

by the bank to procure it from him, the judges held him rightly convicted, although it was objected that the defendant was solicited to commit the act by the bank themselves by means of their agents. (1)

425. Counterfeiting public seals.—Every one is guilty of an indictable offence and liable to imprisonment for life who unlawfully *makes or counterfeits* any public seal of the United Kingdom or any part thereof, or of Canada or any part thereof, or of any dominion, possession or colony of Her Majesty, or the impression of any such seal, or *uses* any such seal or impression, knowing the same to be so counterfeited. R.S.C., c. 165, s. 4.

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 Queen's Printer for Canada, or the Government Printer for any province of Canada, as the case may be, or tenders in evidence any copy of any proclamation, order, regulation or appointment which falsely purports to have been printed as aforesaid, knowing that the same was not so printed. R.S.C., c 165, s. 37.

428. Sending telegrams in false name.—Every one is guilty of an indictable offence who, *with intent to defraud*, causes or procures any telegram to be sent or delivered as being sent by the authority of any person, knowing that it is not sent by such authority, with intent that such telegram should be acted on as being sent by that person's authority, and is liable, upon conviction thereof, to the same punishment as if he had forged a document to the same effect as that of the telegram.

429. Sending false telegrams, or letters.—Every one is guilty of an indictable offence and liable to two years' imprisonment who, with intent to injure or alarm *any person*, sends, causes, or procures to be sent any telegram or letter or other message containing matter which he knows to be false.

430. Possessing forged bank notes.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, without lawful authority or excuse (the proof whereof shall lie on him), purchases or receives from any person, or *has in* his custody or

(1) R. v. Holden, 2 Taunt. 334 ; R. & R. 154.

possession, any forged bank note, or forged blank bank note, whether complete or not, knowing it to be forged. R.S.C., c. 165, s. 19.

For definition of *having in possession*, see article 3 (*k*), *ante*, p. 3.

431. Drawing document without authority.—Every one is guilty of an indictable offence who, *with intent to defraud* and without lawful authority or excuse, makes or executes, draws, signs, accepts or endorses, in the name or on the account of another person, *by procuration or otherwise*, ANY DOCUMENT, or makes use of or utters any such document knowing it to be so made, executed, signed, accepted or endorsed, and is liable to the same punishment as if he had forged such document. R.S.C., c. 165, s. 30.

For definition of "*document*" see article 419 *ante*.

432. Using any forged instrument, or any probate obtained by forgery or perjury—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment, who—

(*a.*) demands, receives, obtains or causes, or procures to be delivered or paid to *any person*, anything under, upon, or by virtue of *any forged instrument* knowing the same to be forged, *or* under, upon, or by virtue of *any probate or letters of administration*, knowing the will, codicil, or testamentary writing on which such probate or letters of administration were obtained to be forged, or knowing the probate or letters of administration to have been obtained by any false oath, affirmation, or affidavit ; or

(*b.*) attempts to do any such thing as aforesaid. R.S.C., c. 165, s. 45.

The Imperial Statute, 24-25 Vict. c. 98, s. 38, is to the same effect as this article, except that it contains the words "*with intent to defraud.*"

PART XXXII.

PREPARATION FOR FORGERY AND OFFENCES RESEMBLING FORGERY.

433. Interpretation of terms.—In this part the following expressions are used in the following senses :

(*a.*) "Exchequer bill paper" means any paper provided by the proper authority for the purpose of being used as exchequer bills, exchequer bonds, notes, debentures, or other securities mentioned in section four hundred and twenty ;

(*b.*) "Revenue paper" means any paper provided by the proper authority for the purpose of being used for stamps, licenses, or permits, or for any other purpose connected with the public revenue.

434. Instruments of forgery.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, *without lawful authority or excuse* (the proof whereof shall lie on him)—

(*a.*) makes, begins to make, uses or knowingly has in his possession, any machinery or instrument or material for making exchequer bill paper, revenue paper or paper intended to resemble the bill paper of any firm or body corporate, or person carrying on the business of banking. R.S.C., c. 165, ss. 14, 16, 20 and 24; or

(*b.*) engraves or makes upon any plate or material anything purporting to be, or apparently intended to resemble, the whole or any part of any exchequer bill or bank note. R.S.C., c. 165, ss. 20, 22 and 24; or

(*c.*) uses any such plate or material for printing any part of any such exchequer bill or bank note. R.S.C., c. 165, ss. 22 and 23; or

(*d.*) knowingly has in his possession any such plate or material as aforesaid. R.S.C., c. 165, ss. 22 and 23; or

(*e.*) makes, uses or knowingly has in his possession any exchequer bill paper, revenue paper, or any paper intended to resemble any bill paper of any firm, body corporate, company, or person, carrying on the business of banking, or any paper upon which is written or printed the whole or any part of any exchequer bill, or of any bank note. R.S.C., c. 165, ss. 15, 16, 20 and 24.

(*f.*) engraves or makes upon any plate or material anything intended to resemble the whole or any distinguishing part of any bond or undertaking for the payment of money used by any dominion, colony or possession of Her Majesty, or by any foreign prince or state, or by any body corporate, or other body of the like nature, whether within Her Majesty's dominions or without. R.S.C., c. 165, s. 25; or

(*g.*) uses any such plate or other material for printing the whole or any part of such bond or undertaking. R.S.C., c. 165, s. 25; or

(*h.*) knowingly offers, disposes of or has in his possession any paper upon which such bond or undertaking, or any part thereof, has been printed. R.S.C., c. 165, s. 25.

Before a forged note was first presented at the Bank of England, that establishment had freely circulated its notes for more than sixty years; no attempt to imitate its paper being made during all that time.

The man who led the van in this line of wrong doing was Richard William Vaughan, a linen draper in 1758. If Vaughan had not shewn how easily they could be counterfeited, there is no knowing how much longer bank notes might have remained free from imitation.

After the Vaughan forgeries came those of a clever engraver named John Mathison. He forged a number of Bank of England notes; the paper, engraving, water-mark and general appearance of the counterfeits being superior almost to the genuine notes. He was in the habit of procuring notes from the bank, in order the more accurately to copy them. He was very incautious and his frequent visits to the bank, with other circumstances, created a suspicion that

he might be connected with the counterfeit notes which were found to be circulating. On one occasion, while Mathison was in the bank, a forged note of his own was presented, and the teller, half in jest and half in earnest, charged Maxwell, (the name by which Mathison's was known), with some knowledge of the forgeries Further suspicion was excited; and the next day he was decoyed into the presence of the directors of the bank. He declined to answer any questions, and watching his chance, he raised a window, and dashed out into the street. He was recaptured, and ultimately made a full confession, in which he said he could make a whole note in one day. He offered to explain the secret of his discovery of the water-mark, provided the bank officials would intercede with the government to spare his life; but his offer was rejected, and he was executed.

From 1797, executions for forgery of £1 notes increased to an alarming extent. During the six years prior to the issue of £1 notes there was but one capital conviction four counterfeiting During the four following years there were eighty-five offenders convicted of the offence, and executed.

This enormous increase produced enquiry, which resulted in an act, "For the better prevention of the forgery of the notes and bills of exchange of persons carrying on the business of bankers." By this Act stringent penalities were provided, and the following notice was, in September 1801, published in all the London newspapers :—" All the one and two pound notes issued by the Bank of England, after this date, will, to prevent forgeries, be printed on a peculiar and purposely constructed paper."

This endeavor to repress crime fell far short of success, owing, as has been well said, "to the great truth that punishment is not a sufficient preventative of crime; but that to teach men to be good is more effectual than to punish them for being bad."

At the beginning of the present century Mr Robert Astlett the cashier of the Bank of England was discovered to have perpetrated upon the bank a very serious fraud. It appears that Astlett had been in sole charge of all exchequer bills brought to the bank, and it was his duty to deliver them in person to the directors who counted them and gave Astlett a receipt. The prisoner had led the directors to believe that he had handed them bills to the amount of £700,000 when in fact he had only delivered to them, £500,000. So completely did the cashier deceive the directors that two of them by their signatures vouched for the delivery of the larger amount.

Astlett was in the first instance tried for the felonious embezzlement of three exchequer bills for £1000 each; but by means of a technicality he was acquitted. He was afterwards tried for his other thefts, and convicted. The sentence, of death, however, was never executed; and Astlett remained in Newgate prison for many years. The total loss sustained by the Bank of England by Astlett's thefts amounted to £320,000.

The Bank of England also lost £360,000 by the Fauntleroy forgeries.

Henry Fauntleroy was a partner in a private banking house, and joint trustee in an account with some other gentlemen in the Imperial three-per cents. He forged, for the sale of these, a power of attorney, which passed the ordeal of the bank examinations. In the management of the trust some difficulties arose; and the only plan which could save the executors was to throw the property into chancery. Fauntleroy strenuously objected. In the course of the dispute, one of the trustees visited the bank and learned the fearful intelligence which first led to the discovery of a series of forgeries, so gigantic and unparalleled in their nature, as to border on the regions of fiction.

Fauntleroy was arrested; and among his papers was found this unique document:

"In order to keep up the credit of our house, I have forged powers of attorney, and have, thereupon, sold out all these sums, without the knowledge of my partners. I have given credit in the accounts for interest when it became due.

The Bank of England first began to refuse our acceptances, and thereby destroyed the credit of our house. The Bank shall smart for it.

HENRY FAUNTLEROY."

He was true to his word; for the bank, as already stated, suffered to the extent of £360,000. The crime excited the greatest interest. The public press teemed with his doings. He had a book containing a classified list of his forgeries. He was tried, convicted and expiated his crime at Newgate amidst thousands of spectators.

Forgeries still continued, and executions occurred weekly. In April 1820 forty persons were held in London for counterfeiting, and men were hung in strings. From one or two manufactories issued most of the forged notes which were in circulation. The manufacturer of thousands of notes remained unmolested, while the utterer of one was hanged. The forgeries were sold to ignorant, uneducated men, for a few shillings in the pound; and there was always a sufficient number, urged by want, desire, or vice, to run the risk which attended the uttering of them.

It was eventually found that to prevent a crime was better than to punish it. Capital punishment for forgery and counterfeiting was abolished; and education, intelligence, and the adoption of a note almost impossible to imitate, have now rendered the forgery of Bank of England notes almost impossible. (1)

435. Conterfeiting stamps, etc.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who—

(*a.*) *fraudulently* conterfeits any stamp, whether impressed or adhesive, used for the purposes of revenue by the Government of the United Kingdom or of Canada, or by the Government of any province of Canada, or of any possession or colony of Her Majesty, or by any foreign prince or state; or

(*b.*) *knowingly* sells or exposes for sale, or utters or uses any such counterfeit stamp; or

(*c.*) *without lawful excuse* (the proof whereof shall lie on him) makes, or has knowingly in his possession, any die or instrument capable of making the impression of any such stamp as aforesaid, or any part thereof; or

(*d.*) *fraudulently* cuts, tears or in any way removes from any material any such stamp, with intent that any use should be made of such stamp or of any part thereof; or

(*e.*) *fraudulently* mutilates any such stamp with intent that any use would be made of any part of such stamp; or

(*f.*) *fraudulently* fixes or places upon any material, or upon any such stamp, as aforesaid, any stamp or part of a stamp which, whether fraudulently or not, has been cut, torn, or in any other way removed from any other material or out of or from any other stamp; or

(*g.*) *fraudulently* erases, or otherwise, either really or apparently, removes, from any stamped material any name, sum, date, or other

(1) Francis' Hist. Bk. of Eng., 155, 167.

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.

436. Falsifying registers.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment, who—

(*a.*) *unlawfully* destroys, defaces or injures any register of births, baptisms, marriages, deaths or burials required or authorized by law to be kept in Canada, or any part thereof, or any copy of such register, or any part thereof required by law to be transmitted to any registrar or other officer ; or

(*b.*) *unlawfully* inserts in any such register, or any such copy thereof, any entry, known by him to be false, of any matter relating to any birth, baptism, marriage, death or burial, or erases from any such register or document any material part thereof. R.S.C., c. 165, ss. 43 and 44.

Where a person, knowing his name to be A., signed, in the register, another name as a witness to a marriage, it was held, under the Imperial statute (24–25 Vic., c. 98, s. 36), corresponding with the foregoing article, that he was guilty of inserting a false entry in the register. (1)

It has been held that it is not the less a "destroying, defacing or injuring" of a register, because the register, when produced in evidence has the torn part pasted in, and is as legible as before. (2)

Where a false entry had been actually made in a register of births, *etc.*, on the information of the defendant, he was held under sec. 43 of 6 and 7 Will. 4, c. 86, (re-enacted in the 24 and 25 Vict., c. 98, s. 36), to be thereby guilty of the offence of causing the false entry to be made. (3)

437. Falsifying extracts from registers.—Every one is guilty of an indictable offence and liable to ten years' imprisonment, who—

(1) R. v. Asplin, 12 Cox, 391.
(2) R. v. Bowen, 1 Den. 22.
(3) R. v. Mason, 2 C. & K. 622 ; R. v. Dewitt, 2 C. & K. 905.

(*a.*) being a person authorized or required by law to give any certified copy of any entry in any such register as in the last preceding section mentioned, certifies any writing to be a true copy or extract, knowing it to be false, or knowingly utters any such certificate;

(*b.*) *unlawfully* and for any *fraudulent* purpose takes any such register or certified copy from its place of deposit or conceals it;

(*c.*) being a person having the custody of any such register or certified copy, permits it to be so taken or concealed as aforesaid. R.S.C., c. 165, s. 44.

438. Uttering false certificates.—Every one is guilty of an indictable offence and liable to seven years' imprisonment, who—

(*a.*) being by law required to certify that any entry has been made in any such register as in the two last preceding sections mentioned makes such certificate *knowing* that such entry has not been made; or

(*b.*) being by law required to make a certificate or declaration concerning any particular required for the purpose of making entries in such register *knowingly* makes such certificate or declaration containing a falsehood; or

(*c.*) being an officer having custody of the records of any court, or being the deputy of any such officer, *wilfully* utters a false copy or certificate of any record; or

(*d.*) not being such officer or deputy *fraudulently* signs or certifies any copy or certificate of any record, or any copy of any certificate, as if he were such officer or deputy. R.S.C., c. 165, ss. 35 and 43.

439. Forging certificates.—Every one is guilty of an indictable offence and liable to two years' imprisonment, who—

(*a.*) being an officer required or authorized by law to make or issue any certified copy of any document or of any extract from any document *wilfully* certifies, as a true copy of any document or of any extract from any such document, any writing which he knows to be untrue in any material particular; or

(*b.*) not being such officer as aforesaid *fraudulently* signs or certifies any copy of any document, or of any extract from any document, as if he were such officer.

440. Making false entries in books relating to public funds.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, *with intent to defraud*—

(*a.*) makes any untrue entry or any alteration in any book of account kept by the Government of Canada, or of any province of Canada, or by any bank for any such Government, in which books are kept the accounts of the owners of any stock, annuity or other public fund transferable for the time being in any such books, or who, in any manner, *wilfully* falsifies any of the said books; or

(*b.*) makes any transfer of any share or interest of or in any stock, annuity or public fund, transferable for the time being at any of the said banks, in the name of any person other than the owner of such share or interest. R.S.C, c. 165, s. 11.

441. Clerk issuing false dividend warrants.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who, being in the employment of the Government of Canada, or of any province of Canada, or of any bank in which any books of account mentioned in the last preceding section are kept, with intent to defraud, makes out or delivers any dividend warrant, or any warrant for the payment of any annuity, interest or money payable at any of the said banks, for an amount greater or less than that to which the person on whose account such warrant is made out is entitled. R.S.C., c. 165, s. 12.

442. Printing circulars etc., in likeness of notes.—Every one is guilty of an offence and liable, on summary conviction before two justices of the peace, to a fine of one hundred dollars or three months' imprisonment, or both, who designs, engraves, prints or in any manner makes, executes, utters, issues, distributes, circulates or uses any business or professional card, notice, placard, circular, hand-bill or advertisement in the likeness or similitude of any bank note, or any obligation or security of any Government or any bank. 50-51 V., c. 47, s. 2; 53 V., c. 31, s. 3.

PART XXXIII.

FORGERY OF TRADE MARKS—FRAUDULLENT MARKING OF MERCHANDISE.

443. Definitions.—In this part—

(*a.*) the expression "trade mark" means a trade mark or industrial design registered in accordance with *The Trade Mark and Design Act* and the registration whereof is in force under the provisions of the said Act, and includes any trade mark which, either with or without registration, is protected by law in any British possession or foreign state to which the provisions of section one hundred and three of the Act of the United Kingdom, known as *The Patents, Designs, and Trade Marks Act*, 1883, are, in accordance with the provisions of the said Act, for the time being applicable;

(*b.*) the expression "trade description" means any description, statement, or other indication, direct or indirect—

(i) as to the number, quantity measure, gauge or weight of any goods;

(ii.) as to the place or country in which any goods are made or produced;

(iii.) as to the mode of manufacturing or producing any goods;

(iv.) as to the material of which any goods are composed;

(v.) as to any goods being the subject of an existing patent, privilege or copyright;

And the use of any figure, word, or mark which, according to the custom of the trade, is commonly taken to be an indication of any of the above matters, is a trade description within the meaning of this part;

(*c.*) the expression "false trade description" means a trade description which is false in a material respect as regards the goods to which it is applied, and includes every alteration of a trade description, whether by way of addition, effacement, or otherwise, where that alteration makes the description false in a material respect; and the fact that a trade description is a trade mark, or part of a trade mark, shall not prevent such trade description being a false trade description within the meaning of this part;

(*d.*) the expression "goods" means anything which is merchandise or the subject of trade or manufacture;

(*e.*) the expression "covering" includes any stopper, cask, bottle, vessel, box, cover, capsule, case, frame or wrapper; and the expression "label" includes any band or ticket;

(*f.*) the expressions "person, manufacturer, dealer, or trader," and "proprietor" include any body of persons corporate or unincorporate;

(*g.*) the expression "name" includes any abbreviation of a name.

2. The provisions of this part respecting the application of a false trade description to goods extend to the application to goods of any such figures, words or marks, or arrangement or combination thereof, whether including a trade mark or not, as are reasonably calculated to lead persons to believe that the goods are the manufacture or merchandise of some person other than the person whose manufacture or merchandise they really are.

3. The provisions of this part respecting the application of a false trade description to goods, or respecting goods to which a false trade description is applied, extend to the application to goods of any false name or initials of a person, and to goods with the false name or initials of a person applied, in like manner as if such name or initials were a trade description, and the expression "false name or initials" means, as applied to any goods, any name or initials of a person which—

(*a.*) are not a trade mark, or part of a trade mark;

(*b.*) are identical with, or a colourable imitation of the name or initials of a person carrying on business in connection with goods of

the same description, and not having authorized the use of such name or initials;

(*c.*) are either those of a fictitious person or of some person not *bonâ fide* carrying on business in connection wich such goods. 51 V., c. 41, s. 2.

No prosecution for any offence under this part, (XXXIII), can be commenced after the expiration of three years from the time of its commission. (See Art. 551 *a*, *post*.

Article 710, *post*, provides that, in cases under this part, 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.

444. Words or marks on watch cases.—Where a watch case has thereon any words or marks which constitute, or are, by common repute, considered as constituting a description of the country in which the watch was made, and the watch bears no such description, those words or marks shall *primâ facie* be deemed to be a description of that country within the meaning of this part, and the provision of this part with respect to goods to which a false description has been applied, and with respect to selling or exposing, or having in possession, for sale, or any purpose of trade or manufacture, goods with a false trade description, shall apply accordingly; and, for the purposes of this section, the expression "watch" means all that portion of a watch which is not the watch case. 51 V., c. 41, s. 11.

445. Forgery of trade-marks, etc.—Every one is deemed to forge a trade mark who either,—

(*a.*) without the assent of the proprietor of the trade mark, makes that trade mark or a mark so nearly resembling it as to be calculated to deceive; or

(*b.*) falsifies any genuine trade mark, whether by alteration, addition, effacement or otherwise.

2. And any trade mark or mark, so made or falsified, is, in this part, referred to as a forged trade mark. 51 V., c. 41, s. 3.

446. Every one is deemed to apply a trade mark, or mark, or trade description to goods who.—

(*a.*) applies it to the goods themselves; or

(*b.*) applies it to any covering, label, reel, or other thing in or with which the goods are sold or exposed or had in possession for any purpose of sale, trade, or manufacture; or

(*c.*) places, incloses or annexes any goods which are sold or exposed or had in possession for any purpose of sale, trade, or manufacture in, with, or to any covering, label, reel, or other thing to which a trade mark or trade description has been applied; or

(*d.*) uses a trade mark, or mark, or trade description in any manner calculated to lead to the belief that the goods in connection with

which it is used are designated or described by that trade mark, or mark, or trade description.

2. A trade mark, or mark, or trade description is deemed to be applied whether it is woven, impressed, or otherwise worked into, or annexed, or affixed to the goods, or to any covering, label, reel or other thing.

3. Every one is deemed to falsely apply to goods a trade mark, or mark, who, without the assent of the proprietor of the trade mark, applies such trade mark, or a mark, so nearly resembling it as to be calculated to deceive. 51 V., c. 41 s. 4.

447. 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.

448. **Selling goods falsely marked.—Defense.**—Every one is guilty of an indictable offence, who sells or exposes, or has in his possesion, 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 resemblimg 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.

449. **Selling bottles marked with trade mark, without consent of owner.**—Every one is guilty of an indictable offence, who sells, or exposes, or offers for sale, or traffics in, bottles marked with a trade mark, blown or stamped or otherwise permanently affixed thereon, without the assent of the proprietor of such trade mark. 51 V., c. 41, s. 7.

450. **Punishments.**—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.

451. Falsely representing that goods are manufactured for Her Majesty, etc.—Every one is guilty of an offence, and liable, on summary conviction, to a penalty not exceeding one hundred dollars, who falsely represents that any goods are made by a person holding a royal warrant, or for the service of Her Majesty or any of the royal family, or any Government department of the United Kingdom or of Canada. 51 V., c. 41, s. 21.

452. Unlawful importation of goods liable to forfeiture under this part.—Every one is guilty of an offence, and liable, on summary conviction, to a penalty of not more than five hundred dollars nor less than two hundred dollars, who imports or attempts to import any goods which, if sold, would be forfeited under the provisions of this part, or any goods manufactured in any foreign state or country which bear any name or trade mark which is or purports to be the name or trade mark of any manufacturer, dealer or trader in the United Kingdom or in Canada, unless such name or trade mark is accompanied by a definite indication of the foreign state or country in which the goods were made or produced; and such goods shall be forfeited. 51 V., c. 41, s. 22.

Sections 15, 16, 18, and 22 of the Merchandise Marks Offences Act (51 Vict c. 41.), remain unrepealed, (See Schedule Two, *post*); and are as follows;—

Disposal of forfeited articles.—"Any goods or things forfeited under any provision of this Act, may be destroyed or otherwise disposed of in such a manner as the court, by which the same are declared forfeited, directs; and the court may, out of any proceeds realized by the disposition of such goods (all trade marks and trade descriptions, being first obliterated), award to any innocent party any loss he may have innocently sustained in dealing with such goods." (Section 15.)

Costs.—"On any prosecution under this Act, the court may order costs to be paid to the defendant by the prosecutor, or to the prosecutor by the defendant, having regard to the information given by and the conduct of the defendant and prosecutor respectively." (Section 16.)

Warranty of trade-marks, etc.—"On the sale or in the contract for the sale of any goods to which a trade mark or mark or trade

description has been applied, the vendor shall be deemed to warrant that the mark is a genuine trade mark and not forged or falsely applied, or that the trade description is not a false trade description within the meaning of this Act, unless the contrary is expressed in some writing signed by or on behalf of the vendor and delivered at the time of the sale or contract to and accepted by the vendee." (Section 18.)

Importation of goods specially prohibited. — "The importation of any goods which, if sold, would be forfeited under the foregoing provisions of this Act, and of goods manufactured in any foreign state or country which bear any name or trade mark, which is or purports to be the name or trade mark of any manufacturer, dealer or trader in the United Kingdom or in Canada, is hereby prohibited, unless such name or trade mark is accompanied by a definite indication of the foreign state or country in which the goods were made or produced; and any person, who imports or attempts to import any such goods, shall be liable to a penalty of not more than five hundred dollars, nor less than two hundred dollars, recoverable on summary conviction and the goods so imported or attempted to be imported shall be forfeited and may be seized by any officer of the Customs and dealt with in like manner as any goods or things forfeited under this Act:

2. Whenever there is, on any goods, a name which is identical with or a colorable imitation of the name of a place in the United Kingdom or in Canada, such name, unless it is accompanied by the name of the state or country in which it is situate, shall, unless the Minister of Customs decides that the attaching of such name is not calculated to deceive, (of which matter the said Minister shall be the sole judge), be treated, for the purposes of this section, as if it was the name of a place in the United Kingdom or in Canada:

3. The Governor in Council may, whenever he deems it expedient in the public interest, declare that the provisions of the two 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." (Section 22.)

453. Defences.—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. No servant of a master, resident in Canada, who *bonâ fide* acts in obedience to the instructions of such master, and, on demand made by or on behalf of the prosecutor, gives full information as to his master, is liable to any prosecution or punishment for any offence defined in this part. 51 V., c. 41, s. 20.

455. 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.

PART XXXIV.

PERSONATION.

456. Personation with intent to obtain any property.—Every one is guilty of an indictable offence, and liable to fourteen years' imprisonment, who, with intent fraudulently to obtain any *property*, personates any person, living or dead, or administrator, wife, widow, next of kin or relation of any person.

Under section 1 of "The False Personation Act, 1874," 37 and 38 Vic., c. 36 (Imp.), the punishment for this offence is penal servitude for life.

For definition of "*property*," see article 3 (v.), p. 5, *ante*.

Upon an indictment, under 2 and 3 Will. 4, c. 53, s. 41, for personating a soldier, it was held to be no defence that the prisoner was authorized by the soldier to personate him, or that the prisoner had bought, from the soldier personated, the prize money to which the latter was entitled (1)

Upon an indictment, under 28 and 29 Vic., c. 124, s. 8, for personating a seaman in order to obtain his wages, it was held that the offence was complete, although the wages had already been paid. (2)

457. Personation at examinations.—Every one is guilty of an indictable offence, and liable on indictment or summary conviction to one year's imprisonment, or to a fine of one hundred dollars, who falsely, with intent to gain some advantage for himself or some other person, personates a candidate at any competitive or qualifying examination, held under the authority of any law or statute or in connection with any university or college, or who procures himself or any other person to be personated at any such examination, or who knowingly avails himself of the results of such personation.

458. Personation of owners of stock, etc.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who falsely and deceitfully personates—

(*a.*) any owner of any share or interest of or in any stock, annuity, or other public fund transferable in any book of account kept by the government of Canada or of any province thereof, or by any bank for any such government; or

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(1) R. v. Lake, 11 Cox, 333.
(2) R. v. Cramp, R. & R. 327. See R. v. Pringle, 2 Mood. C. C. 127.

(*b.*) any owner of any share or interest of or in the debt of any public body. or of or in the debt or capital stock of any body corporate, company, or society ; or

(*c.*) any owner of any dividend, coupon, certificate or money payable in respect of any such share or interest as aforesaid ; or

(*d.*) any owner of any share or interest in any claim for a grant of land from the crown, or for any scrip or other payment or allowance in lieu of such grant of land ; or

(*e.*) any person duly authorized by any power of attorney to transfer any such share, or interest, or to receive any dividend, coupon, certificate or money, on behalf of the person entitled thereto—

and thereby transfers or endeavours to transfer any share or interest belonging to such owner, or thereby obtains or endeavours to obtain, as if he were the true and lawful owner or were the person so authorized by such power of attorney, any money due to any such owner or payable to the person so authorized, or any certificate, coupon, or share warrant, grant of land, or scrip, or allowance in lieu thereof, or other document which, by any law in force, or any usage existing at the time, is deliverable to the owner of any such stock or fund, or to the person authorized by any such power of attorney. R.S.C., c. 165, s. 9.

459. Acknowledging any instrument in a false name.—Every one is guilty of an indictable offence and liable te 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.

This article is to the same effect as sec. 34 of the Imperial statute, 24-25 Vict., c. 98.

As to false personation of voters at parliamentary elections, see the *Dominion Elections Act*, R.S.C., c. 8, ss. 89, 90, and 103; and the *North West Territories Representation Act*, R.S.C., c. 75, s. 65.

Where a person who applied for a ballot paper in a name which was not his own nor the name by which he was generally known, but which name appeared on the voters' list, and had been inserted therein by the officials who prepared the list under the belief that it was the applicant's name, he was held entitled to vote, and not guilty of the offence of personation. (1)

It has been held that in an indictment for the offence of personating a voter, there should be an averment negativing the identity of the defendant with the voter alleged to have been personated. (2)

A conviction for the offence of inducing a person to personate a voter was held good, though it did not set out the mode or facts of the inducement. (3)

(1) R. v. Fox, 16 Cox, C. C. 166.
(2) R. v. Hogg, 25 U. C. Q. B. 68.
(3) R. v. Hague, 12 W. R. 310.

In a prosecution for personation of a voter, it was held unnecessary to state in the indictment or to prove at the trial that the officer presiding at the polling booth, where the offence was committed, was duly appointed. (1)

PART XXXV.

OFFENCES RELATING TO THE COIN.

460. Interpretation of terms.—In this part, unless the context otherwise requires, the following words and expressions are used in the following senses :

(*a.*) "Current gold or silver coin," includes any gold or silver coin coined in any of Her Majesty's mints, or gold or silver coin of any foreign prince or state or country, or other coin lawfully current, by virtue of any proclamation or otherwise, in any part of Her Majesty's dominions.

(*b.*) "Current copper coin," includes copper coin coined in any of Her Majesty's mints, or lawfully current, by virtue of any proclamation or otherwise, in any part of Her Majesty's dominions.

(*c.*) "Copper coin," includes any coin of bronze or mixed metal and every other kind of coin other than gold or silver.

(*d.*) "Counterfeit" means false, not genuine.

(i.) Any genuine coin prepared or altered so as to *resemble* or *pass* for any current coin of a higher denomination is a counterfeit coin.

(ii.) A coin fraudulently filed or cut at the edges so as to remove the milling, and on which a new milling has been added to restore the appearance of the coin, is a counterfeit coin.

(*e.*) "Gild" and "silver," as applied to coin, include casing with gold or silver respectively, and washing and colouring by any means whatsoever with any wash or materials capable of producing the appearance of gold or silver respectively.

(*f.*) "Utter" includes "tender" and "put off." R.S.C., c. 167, s. 1.

Counterfeiting.—It is "one of the royal prerogatives belonging to every sovereign prince that he alone in his own dominions may order and dispose the quantity, value, and fashion of his coin;" (2) and the coining of money, the legitimation of foreign coin, and the giving of value to coin, foreign and domestic, are branches of the ancient prerogative of the Crown of England. (3)

Lord Hale observes that money consists principally of three parts, 1. The material of which it is made, 2. The denomination or extrinsic value, and 3.

(1) R. v. Garvey, 16 Cox (Ir. C. C. R.) 252.
(2) Tomlins Law Dict. *Coin.*
(3) 2 Bish. New Cr. Law Com. ss. 276, 277.

The impression or stamp; and that, anciently all coin was of gold or silver, alloyed with a given proportion of copper, constituting what is called sterling, or its legal standard; but that in 1672 a copper coin was added. (1)

From the relation of the Crown to the coin it became judicially established from the earliest times that the counterfeiting of the king's coin was treason, though the counterfeiting of foreign money made current by the king's proclamation was at one time misdemeanor. (2) But the Statute of 1 Mary, sess. 2, c. 6, made the latter treason likewise. (3) In England, at the present time, the principal offences against the coin are felonies, (4) and the simple uttering of counterfeit coin is a misdemeanor. (5)

Counterfeiting is the making of false or spurious coin to imitate the genuine. (See Art. 460, *ante*.)

See article 560, *post*, as to search warrant, and see clause 6 of that article as to powers of justices to deface or otherwise dispose of counterfeit money found and brought before them under any search warrant.

461. When offence is complete.—Every 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.

This article is to the same effect as sec. 30 of the Imperial statute 24 and 25 Vict. c. 99.

462. Counterfeiting coins, &c.—Every one is guilty of an indictable offence and liable to imprisonment for life who—

(*a.*) makes or begins to make any counterfeit coin resembling, or apparently intended to resemble or pass for, any current gold or silver coin; or

(*b.*) gilds or silvers any coin resembling or apparently intended to resemble or pass for, any current gold or silver coin; or

(*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

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(1) 1 Hale P. C. 188, 195.
(2) 1 Hale P. C. 192, 210, 215, 219: Case of Mixed Money, 2 How. St. Tr. 113, 116: Case of Mines, Plow. 310, 316.
(3) 1 Hale P. C. 192, 216.
(4) See 24 & 25 Vict. c. 99, (Imp.) ss. 2, 3, 4, 5, 6, 7, 14, 18, 19, 24 and 25.
(5) 24 & 25 Vict. c. 99. (Imp.) s.s. 9, 13, 15, 20, and 21.

(*e.*) gilds or silvers any current copper coin, or files or in any manner alters such coin, with intent to make the same resemble or pass for any current gold or silver coin. R.S.C., c. 167, s.s. 3 and 4.

The money charged as being counterfeited should bear such a resemblance or be apparently intended to bear such a resemblance to the genuine coin as may, in circulation, be likely to impose upon people generally. It was formerly necessary that the coin should have been in a complete and perfect state ready for circulation; (1) and, therefore, where the defendants were taken in the very act of coining shillings, but the shillings coined by them were then in an imperfect state, it being requisite that they should undergo another process, namely immersion in diluted *aqua fortis*, before they could pass as shillings, the judges held that the offence was not complete. (2) But by article 461, *ante*, the offence is deemed complete although the coin be not in a fit state to be uttered or the counterfeiting thereof be not finished or perfected. (3)

It is quite clear that there will be a sufficient counterfeiting where the counterfeit money is made to resemble coin, the impression on which has been *worn away by time*. In one case the shillings produced in evidence were quite smooth, without the smallest vestige of either head or tail, and without any resemblance of the shillings in circulation, except their colour, size, and shape: and the master of the Mint proved that they were bad, but that they were very like those shillings the impression on which had been worn away by time, and might very probably be taken, by persons having less skill than himself, for good shillings. And the Court were of opinion that *a blank* that is smoothed, and made like a piece of legal coin, the impression of which is worn out, and yet suffered to remain in circulation, is sufficiently counterfeited to the similitude of the current coin of the realm to bring the counterfeiters and coiners of such blanks within the statute; these blanks having some reasonable likeness to that coin which has been defaced by time, and yet passed in circulation. (4)

Counterfeiting can rarely be proved directly by positive proof; but it is usually made out by circumstantial evidence, such as finding the necessary coining instruments in the defendant's house, together with some pieces of the counterfeit money in a finished and some in an unfinished state, or such other circumstances as may fairly warrant the jury in presuming that the defendant either counterfeited or caused to be counterfeited or was present, aiding and abetting in counterfeiting the coin in question. (5)

Any credible witness may prove the coin to be counterfeit; and it is not necessary for this purpose to produce any moneyer or other officer from the Mint, whether the coin counterfeited be current coin, or the coin of any foreign prince, state, or country. (6)

463. Dealing in and importing counterfeit coin. — Every one is guilty of an indictable offence and liable to imprisonment for life who, without lawful authority or excuse, the proof whereof shall lie on him—

(*a.*) buys, sells, receives, pays or puts off, or *offers to buy, sell, receive, pay or put off*, at or for a lower rate or value than the same imports, or was apparently intended to import, any counterfeit coin

(1) R. v. Varley, 2 W. Bl. 682.
(2) R. v. Harris, 1 Leach, 165. See R. v. Case, 1 Leach 145; and R. v. Lavey, 1 Leach. 153.
(3) R. v. Hermann, 4 Q. B. D. 284; 48 L. J. (M. C.) 106.
(4) R. v. Wilson, 1 Leach 285; See R. v. Welsh, 1 Leach, 364.
(5) Arch. Cr. Pl. & Ev. 21 Ed. 859.
(6) See article 692, *post*.

resembling or apparently intended to resemble or pass for any current gold or silver coin ; or

(*b.*) imports or receives into Canada any counterfeit coin resembling or apparently intended to resemble or pass for, any current gold or silver coin *knowing* the same to be counterfeit. R.S.C., c. 162, ss. 7 and 8.

464. Manufacture of copper coin and importation of uncurrent copper coin.—Every one who manufactures in Canada any *copper* coin, or imports into Canada any *copper* coin, other than current copper coin, with the intention of putting the same into circulation as current copper coin, is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty dollars for every pound Troy of the weight thereof ; and all such *copper* coin so manufactured or imported shall be forfeited to Her Majesty. R.S.C., c. 167. s. 28.

Copper coin includes coin of bronze or mixed metal and every other kind of coin other than gold or silver. (See article 460 *c.*)

Sections 26, 29, 30, 31, 32, and 34 of R.S.C., c. 167 remain unrepealed (See Schedule two, *post.*) ; and are as follows :—

Suspected coin may be cut.—" If any coin is tendered as current gold or silver coin to any person who suspects the same to be diminished otherwise than by reasonable wearing, or to be counterfeit, such person may cut, break, bend or deface such coin, and if any coin so cut, broken, bent or defaced appears to be diminished otherwise than by reasonable wearing, or to be counterfeit, the person tendering the same, shall bear the loss thereof ; but if the same is of due weight, and appears to be lawful coin, the person cutting, breaking, bending or defacing the same, shall be bound to receive the same at the rate for which it was coined :

2. If any dispute arises whether the coin so cut, broken, bent or defaced, is diminished in manner aforesaid, or counterfeit, it shall be heard and finally determined in a summary manner by any justice of the peace, who may examine, upon oath, the parties as well as any other person, for the purpose of deciding such dispute, and if he entertains any doubt in that behalf, he may summon three persons, the decision of a majority of whom shall be final :

3. Every officer employed in the collection of the revenue in Canada shall cut, break or deface, or cause to be cut, broken or defaced, every piece of counterfeit or unlawfully diminished gold or silver coin which is tendered to him in payment of any part of such revenue in Canada" (Section 26.)

Seizure of unlawfully manufactured or imported copper coin.—" Any two or more justices of the peace, on the oath of a credible person, that any copper or brass coin has been unlawfully manufactured or imported, shall cause the same to be seized and detained, and shall summon the person in whose possession the same is found, to appear before them ; and if it appears to their satisfaction, on the oath of a

credible witness, other than the informer, that such copper or brass coin has been manufactured or imported in violation of this Act, such justice shall declare the same forfeited, and shall place the same in safe keeping to await the disposal of the Governor General for the public uses of Canada." (Section 29.)

Enforcing penalty.—"If it appears to the satisfaction of such justices that the person in whose possession such copper or brass coin was found, knew the same to have been so unlawfully manufactured or imported, they may condemn him to pay the penalty aforesaid, with costs, and may cause him to be imprisoned for a term not exceeding two months, if such penalty and costs are not forthwith paid." (Section 30.)

Recovery of penalty from owner of copper coin.—"If it appears to the satisfaction of such justices that the person in whose possession such copper or brass coin was found was not aware of it having been so unlawfully manufactured or imported, the penalty may, on the oath of any one credible witness other than the plaintiff, be recovered from the owner thereof, by any person who sues for the same in any court of competent jurisdiction." (Sec. 31.)

Seizure by customs officers.—"Any officer of Her Majesty's customs may seize any copper or brass coin imported or attempted to be imported into Canada in violation of this Act, and may detain the same as forfeited, to await the disposal of the Governor General, for the public uses of Canada." (Sec. 32.)

Uttering unlawful copper coin.—"Every one who utters, 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.)

Application of penalties.—"A moiety of any of the penalties imposed by any of the five sections next preceding, but not the copper or brass coins forfeited under the provisions thereof, shall belong to the informer or person who sues for the same, and the other moiety shall belong to Her Majesty, for the public uses of Canada." (Section 34.)

465. Exportation of counterfeit coin.—Every one is guilty of an indictable offence and liable to two years' imprisonment, who, without lawful authority or excuse, the proof whereof shall lie on him, exports or puts on board any ship, vessel or boat, or on any railway or carriage or vehicle of any description whatsoever, for the purpose of being exported from Canada, any counterfeit coin resembling or apparently intended to resemble or pass for any current coin or for any foreign coin of any prince, country or state, *knowing* the same to be counterfeit. R.S.C., c. 167, s. 9.

466. Making instruments for coining.—Every one is guilty of an indictable offence and liable to imprisonment for life, who, *without lawful authority or excuse* the proof whereof shall lie on him, makes, or mends, or begins or proceeds to make or mend, or buys or sells, or has in his *custody or possession*—

(*a.*) any puncheon, counter puncheon, matrix, stamp die, pattern or mould, in or upon which there is made or impressed, or which will make or impress, or which is adapted and intended to make or impress, the figure, stamp or apparent resemblance of both or either of the sides of any current gold or silver coin, or of any coin of any foreign prince, state or country, *or any part or parts* of both or either of such sides; or

(*b.*) any edger, edging or other tool, collar, instrument or engine adapted and intended for the marking of coin round the edges with letters, grainings, or other marks or figures apparently resembling those on the edges of any such coin, *knowing* the same to be so adapted and intended; or

(*c.*) any press for coinage, or any cutting engine for cutting, by force of a screw or of any other contrivance, round blanks out of gold, silver or other metal or mixture of metals, or any other machine, *knowing* such press to be a press for coinage, or *knowing* such engine or machine to have been used or to be intended to be used for or in order to the false making or counterfeiting of any such coin. R.S.C., c. 167, s 24.

For definition of *having in possession*, see article 3 (*k*), *ante*.

Although it is more accurate to describe the instruments according to their actual use, it is not necessary. And, where a prisoner was indicted for having in his possession, without lawful excuse, one *mould* made of lead, on which was made and impressed the figure, stamp, resemblance and similitude of the head side or flat of a shilling, and, the prisoner being convicted, it was submitted to the judges whether the mould in question was comprised under the general words of the statute "other *tool* or *instrument* before mentioned," and whether it should not have been laid in the indictment to be a *tool* or *instrument* in the words of the act; the judges were unanimously of opinion that this mould was a tool or instrument mentioned in the former part of the statute, and was therefore comprised under these general words; and that, as a mould is expressly mentioned by name in the first clause of the act, it need not be averred to be a tool or instrument so mentioned; but they considered that the indictment would have been more accurate had it charged that the prisoner had, in his possession, a mould that would make and impress the similitude of the head side of a shilling. (1)

It is not necessary that the instrument should be capable of making an impression of the whole of one side of the coin; for the words "or any part or parts" are introduced into the above article, and consequently the difficulty in Sutton's case, (2) where the instrument was capable of making the sceptre only, cannot now occur.

On an indictment for making a mould *intended to make and impress the figure and apparent resemblance of the obverse side* of a shilling, it was held

(1) R. v. Lennard, 1 Leach 85.
(2) R. v. Sutton, 2 Str. 1074.

sufficient to prove that the prisoner made the mould and a part of the impression, though he had not completed the entire impression. (1)

It is unnecessary, under this article, to prove the intent of the defendant, the mere similitude being treated as evidence of the intent. Neither is it essential to shew that money was actually made with the instrument in question. (2)

In Ridgeley's case the prisoner was indicted for having in his possession, without lawful authority, etc., a puncheon made of iron and steel, in and upon which was made and impressed the figure, resemblance, and similitude of the head side of a shilling. It was proved that several puncheons were found in the prisoner's lodgings, together with a quantity of counterfeit money, and that he had them knowingly for the purpose of coining. These puncheons were complete and hardened, ready for use: but it was impossible to say that the shillings which were found were actually made with these puncheons, the impressions being too faint to be exactly compared; but they had the appearance of having been made with them. The manner of making the puncheons was as follows. A true shilling was cut away to the outline of the head; that outline was then fixed on a piece of steel, which was filed and cut close to the outline, and this made the puncheon; the puncheon then made the die, or counter-puncheon. A puncheon is complete without letters, but it may be made with letters upon it; though, from the difficulty and inconvenience, it is never so made, at the Mint; but after the die is struck the letters are engraved on it; a puncheon alone, without the counter-puncheon, will not make the figure; but to make an old shilling or a base shilling current, nothing more is necessary than the instrument now produced. They may be used not only for counterfeiting coins, but also for other purposes, such as making seals, buttons, medals, and so forth, where such impressions are wanted. Eleven of the judges (*absente* Lord C. J. De Grey) were unanimously of opinion that this was *a puncheon* within the meaning of the act; for the word "puncheon" is expressly mentioned in the statutes, and will, by the means of the counter-puncheon or matrix, "make or impress the *figure, stamp, resemblance, or similitude of the current coin;*" and that these words do not mean an exact figure, but if the instrument impress a resemblance, in fact, such as will impose on the world, it is sufficient, whether the letters are apparent on the puncheon or not; otherwise the act would be quite evaded, for the letters would be omitted on purpose. The puncheon in question was one to impress the head of King William; and the shillings of his reign, even when the letters were worn out, were current coin of the kingdom. The puncheon made an impression like them, and the coin stamped with it would resemble them on the head side, though there were no letters. This was compared to the case mentioned by Sir Mathew Hale, (3) that the omission or addition of words in the inscription of the true seals, for the purpose of evading the law, would not alter the case. (4)

Where the defendant employed a man, who was a die-sinker, to make, for a pretended innocent purpose, a die calculated to make shillings, and the die-sinker, suspecting fraud, informed the authorities at the Mint, and, under their directions, made the die for the purpose of bringing the offence home to the prisoner, it was held that the die sinker was an innocent agent, and that the defendant was rightly convicted as a principal offender. (5)

The *making* and *procuring* dies and other materials, with the intention of using them in coining Peruvian half dollars, in England, not in order to utter or pass them in England, but so as to try whether the apparatus would answer before

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(1) R. v. Foster, 7 C. & P. 405.
(2) R. v. Ridgeley, 1 Leach, 189; 1 East, P. C. 171.
(3) 1 Hale 184; 2 Hale, 212, 215; R. v. Robinson, 2 Roll. Rep. 50: 1 East, P. C. 86.
(4) R. v. Ridgeley, *ante*.
(5) R. v. Bannon, 2 Mood. C. C. 309; 1 C. & K. 295. See article 62, and comments at p. 36, *ante*.

sending the same out to Peru, to be there used in making the counterfeit coin for circulation in that country, was held indictable at common law. (1)

Article 466 has the words "*without lawful authority or excuse.*" It is sufficient, however, if the possession is averred to have been "*without lawful excuse,*" on the ground that there can be no authority which could not also be an excuse, and therefore to negative excuse is to negative authority. (2)

To prove the guilty knowledge of the defendant upon an indictment for having coining instruments, evidence may be given of his having previously uttered counterfeit money. (3)

The guilty knowledge required is the being, knowingly, in possession of the instrument, without lawful authority or excuse. A guilty *intention* in reference to the use or possession of the instrument is not necessary. (4)

In the case of R. v. Harvey, the prisoner had ordered of a die-sinker two dies having an apparent resemblance to the two sides of a sovereign, whereupon the die sinker communicated with the police, who, in pursuance of orders from the Mint, told him to furnish the dies to the prisoner, which he did. *Held* that the facts constituted unlawful authority or excuse for the prisoner's possession of the dies.

467. Bringing instruments for coining, from Mints, into Canada.—Every one is guilty of an indictable offence and liable to imprisonment for life, who, without lawful authority or excuse, the proof whereof shall lie on him, knowingly conveys out of any of Her Majesty's Mints into Canada, any puncheon, counter puncheon, matrix, stamp, die, pattern, mould, edger, edging or other tool, collar, instrument, press or engine, used or employed in or about the coining of coin, or any useful part of any of the several articles aforesaid, or any coin, bullion, metal or mixture of metals. R.S.C., c 167, s. 25.

468. Clipping current gold or silver Coin.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment, who impairs, diminishes or lightens any current gold or silver coin, with intent that the coin, so impaired, diminished, or lightened, may pass for current gold or silver coin. R.S.C., c. 167, s. 5.

469. Defacing current coins.—Every one is guilty of an indictable offence and liable to one years' 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.

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(1) R. v. Roberts, Dears. 539; 25 L. J. (M. C.) 17: Arch. Cr. Pl. & Ev. 21 Ed. 875, 876.
(2) R. v. Harvey, L. R., 1. C.C.R., 284; 40 L. J. (M. C.) 63.
(3) R. v. Weeks, L. & C. 18; 30 L. J. (M. C.) 141.
(4) R. v. Harvey, *ante.*

471. Possessing counterfeit coins.—Every one is guilty of an indictable offence and liable to three years' imprisonment, who has in his *custody* or *possession*, knowing the same to be counterfeit, and with intent to utter the same or any of them—

(*a.*) any counterfeit coin resembling, or apparently intended to resemble or pass for, any current gold or silver coin ; or

(*b.*) three or more pieces of counterfeit coin resembling, or apparently intended to resemble or pass for, any current copper coin. R.S.C., c. 167, ss. 12 and 16.

See article 3 (*k*), *ante*, for meaning of "*having in possession.*"

472. Offences respecting copper coins.—Every one is guilty of an indictable offence and liable to three years' imprisonment who—

(*a.*) makes, or begins to make, any counterfeit coin resembling, or apparently intended to resemble or pass for, any current copper coin ; or

(*b.*) without lawful authority or excuse, the proof of which shall lie on him, knowingly—

(i.) makes or mends, or begins or proceeds to make or mend, or buys or sells, or has in his custody or possession, any instrument tool or engine adapted and intended for counterfeiting any current copper coin ;

(ii.) buys, sells, receives, pays or puts off, or offers to buy, sell, receive, pay or put off, any counterfeit coin resembling, or apparently intended to resemble or pass for any current copper coin, at or for a lower rate of value than the same imports or was apparently intended to import. R.S.C., c. 167, s. 15.

473. Offences respecting foreign coins.—Every one is guilty of an indictable offence and liable to three years' imprisonment, who—

(*a.*) makes, or begins to make, any counterfeit coin or silver coin resembling, or apparently intended to resemble or pass for, any gold or silver coin of any foreign prince, state or country, not being current coin ;

(*b.*) *without lawful authority or excuse*, the proof of which shall lie on him,—

(i.) brings into or receives in Canada any such counterfeit coin, knowing the same to be counterfeit ;

(ii.) has in his *custody or possession* any such counterfeit coin *knowing* the same to be counterfeit, and with intent to put off the same ; or

(*c.*) utters any such counterfeit coin ; or

(*d.*) makes any counterfeit coin resembling, or apparently intended to resemble or pass for, any copper coin of any foreign prince, state or country, not being current coin. R.S.C., c. 167, ss. 19, 20, 21, 22 and 23.

UTTERING.

474. Uttering counterfeit gold or silver coins.—Every one is guilty of an indictable offence, and liable to fourteen years' imprisonment, who *utters* any counterfeit coin resembling, or apparently intended to resemble or pass for, any current gold or silver coin, *knowing the same to be counterfeit.* R.S.C., c. 167, s. 10.

The word "*utter*" includes "*tender*," and "*put off*." (See article 460 (*f*) *ante*).

This offence is punishable under the Imperial statute 24 & 25 Vict. c. 99, s. 9, with one years imprisonment, with or without hard labor, and with or without solitary confinement.

A "*groat*" is a sufficient description of the English silver four penny piece.(1)

Where a good shilling was handed to a Jew boy for fruit, and he put it into his mouth, under pretence of trying whether it was a genuine coin, and, then, (instead of the good shilling handed to him), he took, out of his mouth, a bad shilling, which he delivered to the prosecutor, saying it was not good: this, (which is one of the mode of ringing the changes), was held to be an uttering of the bad shilling. (2)

It is an "uttering and putting off," as well as a "tendering," if the counterfeit coin be offered in payment, though it be refused by the person to whom it is offered. (3)

The proof that the defendant knew the money to be counterfeit at the time of uttering it will be by circumstantial evidence. If, for instance, it be proved that the defendant uttered, either on the same day or at other times, whether before or after the uttering charged, base money, either of the same or a different denomination, to the same or a different person, or had other pieces of base money about him when he uttered the counterfeit money in question; this will be evidence from which the jury may presume a guilty knowledge (4)

475. Uttering light coins, medals, &c.—Every one is guilty of an indictable offence and liable to three years' imprisonment, who—

(*a.*) utters, as being current, any gold or silver coin of less than its lawful weight, knowing such coin to have been impaired, diminished or lightened, otherwise than by lawful wear; or

(*b.*) *with intent to defraud*, utters, as or for any current gold or 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.

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(1) R. v. Connell, 1 C. & K. 190.
(2) R. v. Franks, 2 Leach, 736.
(3) R. v. Welsh, 2 Den. 78; 20 L. J. (M. C.), 101; See R. v. Radford, 1 Den. 59: R. v. Ion, 2 Den. 475; 21 L. J. (M. C.) 166.
(4) R. v. Whiley, 2 Leach, 983; R. v. Foster, Dears. 456; 24 L. J. (M. C.) 134.

A person knowingly passed, as and for a half-sovereign, a medal of about the same size and color as a half-sovereign. On the obverse side was an impression of the Queen's head as on a half-sovereign, but with a different inscription. The medal itself, however, was not seen by the jury, it being lost in the course of being produced in evidence; and there was no evidence as to the appearance of the reverse side. It was held that there was some evidence that the medal was one, in size, figure, and color, resembling a half-sovereign. (1)

476. Uttering defaced coin.—Every one who utters any coin defaced by having stamped thereon any names or words, is guilty of an offence and liable, on summary conviction before two justices of the peace, to a penalty not exceeding ten dollars. R.S.C., c. 167, s. 18.

No prosecution for any offence under this article can be commenced without the leave of the Attorney-General. (See art. 549, *post*.)

477. Uttering uncurrent copper coins.—Every one who utters, or offers in payment, any copper coin, other than current copper coin, is guilty of an offence and liable on summary conviction, to a penalty of double the nominal value thereof, and, in default of payment of such penalty, to eight days' imprisonment. R.S.C., c. 167, s. 33.

478. Punishment after previous conviction.—Every one, who, after a previous conviction of any offence relating to the coin under this or any other Act, is convicted of any offence specified in this part, is liable to the following punishment: —

(*a.*) to imprisonment for life, if otherwise fourteen years would have been the longest term of imprisonment to which he would have been liable;

(*b.*) to fourteen years' imprisonment, if otherwise seven years would have been the longest term of imprisonment to which he would have been liable;

(*c.*) to seven years' imprisonment, if otherwise he would not have been liable to seven years' imprisonment. R.S.C., c. 167, s. 13.

See article 628, *post*, as to indictment, and article 676, *post*, as to procedure, in cases in which a previous conviction is charged.

A second offence, to be punishable, as such, must be one committed after a conviction for a previous offence. For instance, suppose A. were to pass a base coin on the first of August, another on the second of August, and still another on the third of August, thus making three distinct offences; and suppose in the first instance, he is prosecuted and convicted of the offence committed on the third of August, he cannot, upon a subsequent indictment being laid against him, for either of the previous offences be charged with and punished as having been *previously* convicted of the offence of the third of August: or, suppose, again, that he is, in the first instance, prosecuted, after the third of August, for the offence of the first of August and convicted of such first offence, say, on the tenth of August, he cannot upon a subsequent indictment being laid against him, for either of the offences of the second or third of August be charged with and punished as having been previously convicted of the offence of the first of August; the principle upon which the law proceeds in providing a severer punishment for the repetition of an offence being this, not because the offender has committed the offence more than once, but because

(1) R. v. Robinson, L. & C. 604; 34 L. J. (M. C.), 176.

when an offender has committed and been convicted of an offence he is looked upon as incorrigible, and as treating with contempt his first conviction, if, afterwards, he repeats the offence; but, if the repetition of the offence takes place without his having been convicted, he cannot be said to have treated with contempt a conviction which has not yet taken place; and, therefore, each repetition of the offence, when it takes place before any actual conviction, is looked upon and dealt with as merely a first offence, and is punishable as such. This point was raised, at Montreal, in 1887, upon a petition for *habeas corpus*, before the late Chief Justice Dorion, who quashed a conviction for an offence charged as a second offence, because such second offence was committed prior to the date of the conviction for the first offence. (1)

Before the prisoner has pleaded guilty or been found guilty of the subsequent offence, the previous conviction cannot be given in evidence. (2)

If the prisoner is found guilty of the subsequent offence, and, then, upon being asked whether he has been previously convicted, denies that he has, and the jury, upon the proof, find that he has not been so previously convicted, it has been held, under the English statute, (in which however the distinction between a felony and a misdemeanor is still recognised), that he is entitled to be acquitted of the whole charge, inasmuch as, under the English Act the whole charge is a felony, and he cannot be convicted merely of the uttering, which by the English Act is a misdemeanor; (3) although it was held that, after such acquittal, he could, under the English Act, be re-indicted for the uttering, merely, and that he could not, to such indictment, plead *autrefois acquit*. (4) But, with us, if the prosecution were to fail in proving the previous conviction, the verdict would stand good as to the offence actually proved. (See Art. 675 *post*.)

PART XXXVI.

ADVERTISING COUNTERFEIT MONEY.

479. In this part, the expression "counterfeit token of value" means any spurious or counterfeit coin, paper money, inland revenue stamp, postage stamp, or other evidence of value, by whatever technical, trivial or deceptive designation the same may be described. 51 V., c. 40, s. 1.

480. Every one is guilty of an indictable offence and liable to five years' imprisonment, who—

(*a*.) prints, writes, utters, publishes, sells, lends, gives away, circulates or distributes any letter, writing, circular, paper, pamphlet, handbill or any written or printed matter advertising, or offering or purporting to advertise or offer for sale, loan, exchange, gift or distribution, or to furnish, procure or distribute, any counterfeit token of value, or what purports to be a counterfeit token of value,

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(1) Lambe v. Hall, & Hall, Petitioner, Court of Queen's Bench, Montreal, (not reported). See 1 Hawk P. C. 72. Tuttle v. Com. 2 Gray, (Mass.) 505; Com. v. Daley, 4 Gray, (Mass.) 209; People v. Rutter, 3 Cowen, (N. Y.) 347.

(2) Article 676, *post*; R. v. Martin, L. R., 1 C. C. R., 214; 39 L. J. (M. C.) 31.

(3) R. v. Thomas, L. R., 2 C.C.R., 141; 44 L. J. (M. C.) 42.

(4) Id. Mellor, J.

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 any such fictitious false or assumed name or address, or name other than his own right, proper or lawful name. 51 V., c. 40, ss. 2 and 3.

As to *primâ facie* evidence of the fraudulent character of any letter circular or paper relating to counterfeit tokens, see article 693, *post*.

PART XXXVII.

MISCHIEF.

" Part XXXIV (1) is founded on the provisions of 24 & 25 Vict. c. 97, in which the word *maliciously* very frequently occurs.

" Section 381 (2) is meant to give what we believe to be the legal effect of that word. The first portion of the section is intended to meet such state of facts as that in the case of Reg. v. Child, (3), where a man,—who, out of malice to a fellow lodger, made a bonfire of her furniture on the floor of her room, not meaning that his landlord's house should catch fire,—escaped punishment.

(1) Part XXXIV of the English Draft corresponds with part XXXVII of the present Code.

(2) Sec. 381 of the English Draft corresponds with our article 481.

(3) Reg. v. Child, L. R., 1 C.C.R., 307 ; 40 L. J. (M. C.) 127.

"Under the proviso, (1), a tenant for years, burning his landlord's house, commits an offence, though, in so doing, he burns his own leasehold; and a freeholder burning his own house commits an offence, if he does so *with intent to defraud* the insurers

"The rest of this part re-enacts 24 & 25 Vict. c. 97, with little substantial alteration." Eng. Commrs'. Rep.

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 in an injury to anything in which the offender has an interest, the existence of such interest, if partial, shall not prevent his act being an offence, and, if total, shall not prevent his act being an offence, if done *with intent to defraud*. R.S.C., c 168, ss. 60 and 61.

482. Arson.—Every one is guilty of the indictable offence of arson, and liable to imprisonment for life, who *wilfully sets fire to* any building or structure, whether such building, erection or structure is completed or not, or to any stack of vegetable produce or of mineral or vegetable fuel, or to any mine, or any well of oil or other combustible substance, or to any ship or vessel, whether completed or not, or to any timber or materials placed in any shipyard for building or repairing or fitting out any ship, or to any of Her Majesty's stores or munitions of war R.S.C., c. 168, ss. 2 to 5, 7, 8, 19, 28, 46 and 47.

Arson, at common law, was a felony, and was the *malicious and wilful burning of the house of another*. (2) The burning of a party's own house did not come within this definition: although the burning of a man's own house in a town or so near to other houses as to create danger to them was a great misdemeanor at common law; (3) and, to constitute arson at common law, there must have been an actual *burning* of the whole or some part of the house, (4) although it was not necessary that any flame should be visible. (5) It will be seen, by the above article, 481, that a person will be guilty of arson even if he be the owner of the building, *etc.*, if he wilfully sets fire to it, *with intent to defraud*: and if he be not the owner of, but have only some partial interest in the building, *etc.*, he will be guilty of arson by wilfully setting fire to it, whether he does it with intent to defraud or not. It will be seen, that, instead of the words *wilful burning*, used in the common law definition of arson, the words used in article 482 are, *wilfully sets fire to*, merely; and the burning of any part of the building, *etc.*, however slight, will be sufficient, although the fire be afterwards extinguished. (6)

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(1) Clause 3 of article 481.
(2) 3 Inst. 66; 4 Bl. Com. 220.
(3) 1 Hale 568; 2 East, P. C. 1027.
(4) 1 Hale 569
(5) R. v. Russell, 1 C. & M. 541; R. v. Stallion, R. & M., C C.R., 398: R. v. Parker, 9 C & P. 45.
(6) 1 Hawk. c. 39, s. 17; 1 Hale, 569; Dalt. 506.

It is, generally, by circumstantial evidence that the wilfully setting fire by the defendant must be made out.

Where a house was robbed and burnt, evidence of the fact of the defendant being found in possession of some of the goods, which were in the house, at the time it was burnt, was admitted, as tending to prove him guilty of the arson. (1)

Where the question is, whether the burning was accidental or wilful, evidence is admissible to shew that, on another occasion, the defendant was in such a situation as to render it probable that he was then engaged in the commission of the like offence against the same property; (2) or, that he had previously occupied houses which had been on fire and in respect of which he made insurance claims and got paid; (3) but on a charge of arson, where the question was as to the identity of the prisoner, evidence that, a few days previous to the fire in question, another building of the prosecutor's was on fire, and that the prisoner was then standing by with a demeanor which shewed indifference or gratification, was rejected. (4)

An unfinished house, of which all the walls, external and internal, are built and finished, the roof on, and completed, the flooring of a considerable part laid, and the internal walls and ceilings prepared for plastering, was held to be a "*building*." (5)

It will be seen, that, article 482 covers any building or structure whatever, whether completed or not; and, therefore, the distinctions formerly existing, as shewn by a number of cases cited in Archbold, (6) in regard to the description of the building, or its state of completeness or incompleteness, are no longer material.

When a person is charged with setting fire to his own house, the intent to defraud,—which, according to article 481, clause 3, is an essential ingredient of the offence,—cannot be inferred from the act itself, but must be proved by other evidence. Where, therefore, a defendant was charged with arson with intent to defraud an insurance company, and a sufficient notice to produce the insurance policy had not been given, it was held that secondary evidence of it could not be given, and, that, there being no other evidence of the insurance, the defendant must be acquitted. (7)

Where, on a trial for arson, with intent to defraud an insurance office, no policy of insurance was produced, and the only evidence of the existence of the insurance was the testimony of the insurance company's agent, who stated that the prisoner came to him, in May 1867, about effecting an insurance on the premises, the subject of the alleged arson, and that on the 30th August 1871, (about a month before the alleged arson), the prisoner came again to him, and said he wished *to renew* his policy, and then paid ten shillings; this was held to be sufficient evidence of the existence of an insurance, inasmuch as it was evidence of an admission by the prisoner that there was a policy. (8)

In one case, the counsel for the prosecution suggested, as a motive for the act, the defendant's desire to realise the amount of an insurance which she had upon her goods; and, upon evidence being tendered to shew that she was in easy circumstances, so as to negative the suggested motive, it was admitted. (9)

A quantity of straw, packed on a lurry, in course of transmission to market, and left for the night in an inn-yard, was held not to be a *stack* of straw. (10)

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(1) R. v. Rickman, 2 East, P. C, 1035.
(2) R. v. Dossett, 2 C. & K. 306.
(3) R. v. Gray, 4 F. & F. 1102; and R. v. Voke, R. & R. 531.
(4) R. v. Harris, 4 F. & F. 342.
(5) R. v. Manning, L. R., 1 C. C. R., 338; 41 L. J. (M. C.), 11.
(6) Arch. Cr. Pl. & Ev. 21 Ed. pp. 590, 591.
(7) R. v. Kitson, Dears. 187; 22 L. J. (M. C.) 118.
(8) R. v. Newboult, L. R., 1 C. C. R., 344; 41 L. J. (M. C.), 63.
(9) R. v. Grant, 4 F. & F. 322.
(10) R. v. Satchwell, L. R, 2 C. C. R., 21; 42 L. J. (M. C.) 63.

Where a sailor on board a ship entered a part of the vessel, where spirits were kept, for the purpose of stealing some rum, and, while he was tapping a cask, a lighted match held by him, came in contact with the spirits which were flowing from the cask tapped by him, and a fire ensued, which destroyed the vessel, it was held that a conviction for arson of the ship could not, under these circumstances, be upheld. (1)

A pleasure boat, eighteen feet long, was set fire to, and Patteson. J., inclined to think that it was a vessel within the meaning of the act, but the prisoner was acquitted on the merits, and no decided opinion was given. (2)

483. Attempt to commit Arson.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment, who wilfully attempts to set fire to anything mentioned in the last preceding section, or who wilfully sets fire to any substance so situated that he knows that anything mentioned in the last preceding section is likely to catch fire therefrom. R.S.C., c. 168, ss. 9, 10, 20, 29 and 48.

See article 64, and general remarks and authorities, on "*attempts*," at pp. 40 and 41, *ante*.

484. Setting fire to crops, etc.—Every one is guilty of an indictable offence, and liable to fourteen years' imprisonment, who wilfully sets fire to—

(*a.*) any crop, whether standing or cut down, or any wood, forest, coppice or plantation, or any heath, gorse, furze or fern ; or

(*b.*) any tree, lumber, timber, logs, or floats, boom, dam or slide, and thereby injures or destroys the same. R.S.C., c. 168, ss. 18 and 12.

485. Every one is guilty of an indictable offence and liable to seven years' imprisonment who wilfully attempts to set fire to anything mentioned in the last preceding section, or who wilfully sets fire to any substance so situated that he knows that anything mentioned in the last preceding section is likely to catch fire therefrom. R.S.C., c. 168, s. 20.

A defendant, who set fire to a summer-house in a wood, which fire was thence communicated to the wood, was held to be properly convicted on an indictment charging him with setting fire to the wood. (3)

Where a prisoner was indicted for setting fire to growing furze, Lopez, J., directed the jury that if she set fire to the furze, thinking, although erroneously, that she had a right to do so, they ought not to convict. (4)

486. Recklessly setting fire to any forest, tree, etc.— Every one is guilty of an indictable offence and liable to two years' imprisonment, who, by such negligence as shows him to be reckless or wantonly regardless of consequences, or in violation of a provincial or municipal law of the locality, sets fire to any forest, tree, manufactured lumber, square timber, logs or floats, boom, dam or slide on the Crown domain, or land leased or lawfully held for the purpose

(1) R. v. Faulkner, 13 Cox, (C. C. R. Ir.) 550.
(2) R. v. Bowyer, 4 C. & P. 559.
(3) R. v. Price, 9 C. & P. 729.
(4) R. v. Twose, 14 Cox, 327.

of cutting timber, or on private property, on any creek or river, or rollway, beach or wharf, *so that the same is injured or destroyed.*

2. The magistrate investigating any such charge may, in his discretion, if the consequences have not been serious, dispose of the matter summarily, without sending the offender for trial, by imposing a fine not exceeding fifty dollars, and in default of payment, by the committal of the offender to prison for any term not exceeding six months, with or without hard labour. R.S C., c. 168, s. 11.

487. Threats to burn.—Every one is guilty of an indictable offence and liable to ten years' imprisonment who sends, delivers or utters, or directly or indirectly causes to be received, knowing the contents thereof, any letter or writing threatening to burn or destroy any building, or any rick or stack of grain hay or straw or other agricultural produce, or any grain, hay, or straw, or other agricultural produce in or under any building, or any ship or vessel. R.S.C., c. 173, s. 8.

As to threats to murder, see article 233, *ante*. See, also, articles 403-6, and notes and authorities at pp. 349-354, *ante*, as to threatening letters and other threats

Clause 2 of article 959 provides that, upon complaint by any person, that, on account of threats or on any other account, the complainant is, on reasonable grounds, afraid that his property will be set fire to, the justice hearing the complaint may require the person, who has made the threats, to give security to keep the peace

488. Placing or throwing explosives with intent to damage or destroy anything.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who *wilfully* places or throws any explosive substance *into* or *near* any building or ship with intent to destroy or damage the same or any machinery, working tools, or chattels whatever, whether or not any explosion takes place. R.S.C., c. 168, ss. 14 and 49.

For definition of "*explosive substance*," see article 3 (*i*), *ante*, p. 3.

Where a prisoner was indicted for throwing gun powder against a house and the evidence was that the prisoner had thrown against the house a bottle containing gunpowder, and that there was a fuse in the neck of the bottle, *Kelly*, C. B., ruled that, unless the fuse was lighted at the time the bottle was thrown against the house, the offence was not made out. His Lordship said that "if any body merely threw a bottle containing gunpowder, that would not be sufficient: for if the fuse was not lighted, it could not cause an explosion and it would be merely throwing a *bottle* against a house. (1)

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

(1) R. v. Sheppard, 11 Cox. 302.

(*b.*) shoots or throws anything at an engine or other railway vehicle; or

(*c.*) interferes without authority with the points, signals or other appliances upon any railway; or

(*d.*) makes any false signal on or near any railway; or

(*e.*) wilfully omits to do any act which it is his duty to do; or

(*f.*) does any other unlawful act.

2. Every one who does any of the acts above mentioned, with *intent* to cause such danger, is liable to imprisonment for life. R.S.C., c. 168, ss. 37 and 38.

490. Obstructing the construction or use of any railway. Every one is guilty of an indictable offence and liable to two years' imprisonment, who, by any act or wilful omission, obstructs or interrupts, or causes to be obstructed or interrupted, the construction, maintenance or free use of any railway or any part thereof, or any matter or thing appertaining thereto or connected therewith. R.S.C., c. 168, ss. 38 and 39.

A line of railway constructed and completed under the powers of an Act of parliament and intended for the conveyance of passengers by locomotive power, but not yet used for that purpose, but only for the carriage of materials and workmen, is within the above article. (1)

Where a defendant had unlawfully altered some railway signals, at a railway station, and this alteration caused a train, (which would otherwise have passed the station without slackening speed), to slacken speed and to come nearly to a stand, it was held that he was guilty of *obstructing* a train within the meaning of sec 36 of 24–25 Vic, c. 97, which is to the same effect as our article 490. (2)

Where a defendant, by holding up his arms in the mode used by inspectors of the line, when desirous of stopping a train, intentionally induced the driver of a train to reduce his speed, although the train was not wholly stopped, but immediately afterwards resumed its ordinary speed, he was held to be guilty of an unlawful obstruction. (3)

A., without the consent of the railway company, took a trolley or hand-car, placed it on the track, and ran with it, upon the railway for several miles; and although it was at a time when, ordinarily, no train was running thereon, A was held to have obstructed the free use of the railway. (4) (See article 499 A (*d*) *post*, as to other mischiefs to Railways.)

491. Injuries to packages in custody of railways.—Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty dollars over and above the value of the goods or liquors so destroyed or damaged or to one month's imprisonment, with or without hard labour, or to both, who—

(*a.*) wilfully destroys or damages anything containing any goods or liquors in or about any railway station or building or any vehicle of any kind on any railway, or in any warehouse, ship or vessel,

(1) R. v. Bradford, Bell, 268; 29 L. J. (M. C.), 171.
(2) R. v. Hadfield, L. R., 1 C. C. R. 253; 39 L. J. (M. C.) 131.
(3) R. v. Hardy, L. R., 1 C. C. R., 278; 40 L. J. (M. C.), 62.
(4) R. v. Brownell, 26 N. B. R. 579; Bur. Dig. 164.

with intent to steal or otherwise unlawfully to obtain or to injure the contents, or any part thereof; or

(*b.*) unlawfully drinks or wilfully spills or allows to run to waste any such liquors, or any part thereof. R.S.C., c. 38, s. 62; 51 V., c. 29, s. 297.

492. Injuries to electric telegraphs, &c.—Every one is guilty of an indictable offence and liable to two years' imprisonment who wilfully—

(*a.*) destroys, removes or damages anything which forms part of, or is used or employed in or about any electric or magnetic telegraph, electric light, telephone or fire-alarm, or in the working thereof, or for the transmission of electricity for other lawful purposes; or

(*b.*) prevents or obstructs the sending, conveyance or delivery of any communication by any such telegraph, telephone or fire-alarm, or the transmission of electricity for any such electric light or for any such purpose as aforesaid.

2. Every one who wilfully, by any overt act, *attempts* to commit any such offence is guilty of an offence and liable, on summary conviction, to a penalty not exceeding fifty dollars, or to three months' imprisonment with or without hard labour. R.S.C., c. 168, ss. 40 and 41.

493. Wrecking.—Every one is guilty of an indictable offence and liable to imprisonment for life who wilfully—

(*a.*) casts away or destroys any ship, whether complete or unfinished; or

(*b.*) does any act tending to the 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. Every one is guilty of an indictable offence, and liable to fourteen years' imprisonment, who *attempts* to cast away or destroy any ship, whether complete or unfinished. R.S.C., c. 168, s 48.

495. Interfering with marine signals, buoys, etc.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who wilfully alters, removes or conceals, or *attempts* to alter, remove or conceal, any signal, buoy or other sea mark used for the purposes of navigation.

2. Every one who makes fast any vessel or boat to any such signal, buoy, or sea mark is liable, on summary conviction, to a penalty not exceeding ten dollars, and, in default of payment, to one month's imprisonment. R.S.C., c. 168, ss. 52 and 53.

496. Preventing saving of wrecked vessels or wreck.—Every one is guilty of an indictable offence and liable to seven years' imprison-

ment who wilfully prevents or impedes, or *endeavours* to prevent or impede—

(*a.*) the saving of any vessel that is wrecked, stranded, abandoned or in distress; or

(*b.*) any person in his endeavour to save such vessel.

2. Every one who wilfully prevents or impedes, or *endeavours* to prevent or impede, the saving of any wreck is guilty of an indictable offence and liable, on conviction on indictment, to two years' imprisonment, and on summary conviction before two justices of the peace, to a fine of four hundred dollars or six months' imprisonment with or without hard labour. R.S.C., c. 81, ss. 36 (*b.*) and 37 (*c.*)

For definition of "Wreck," see article 3 (*dd.*), p. 7, *ante*.

497. Injuries to rafts.—Every one is guilty of an indictable offence and liable to two years' imprisonment who wilfully—

(*a.*) breaks, injures, cuts, loosens, removes or destroys, in whole or in part, any dam, pier, slide, boom or other such work, or any chain or other fastening attached thereto, or any raft, crib of timber or saw-logs; or

(*b.*) impedes or blocks up any channel or passage intended for the transmission of timber. R.S.C., c. 168, s. 54.

498. Mischief to mines.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who, *with intent to injure* a mine or oil well, *or obstruct* the working thereof—

(*a.*) causes any water, earth, rubbish or other substance to be conveyed into the mine or oil well or any subterranean channel communicating with such mine or well; or

(*b.*) damages any shaft or any passage of the mine or well; or

(*c.*) damages, *with intent to render useless*, any 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.

The mine may be laid as the property of a person in possession of and working it, though only as agent for others. (1)

If any act covered by this article be done under a *bonâ fide* claim of right, it will not be punishable. (2)

A scaffold erected at some distance above the bottom of a mine, for the purpose of working a vein of coal on a level with the scaffold, was held to be an erection used in conducting the business of the mine. (3)

(1) R. v. John Jones, 7 Mood. C. C. 293; 1 C. & K. 181.
(2) R. v. Matthews, 14 Cox, 5.
(3) R. v. Whittingham, 9 C. & P. 234, Arch. Cr. Pl. & Ev. 21 Ed. 616.

499. Mischiefs causing danger to life, etc.—Every one is guilty of the indictable offence of mischief who *wilfully destroys or damages* any of the property hereinafter mentioned, and is liable to the punishments hereinafter specified :—

(*A.*) **To imprisonment for life,** if the object damaged be—

(*a.*) a dwelling-house, ship or boat, and the damage be caused by an explosion, and any person be in such dwelling-house, ship or boat ; *and the damage causes actual danger to life* ; or

(*b.*) a bank, dyke or wall of the sea, or of any inland water, natural or artificial, or any work in, on, or belonging to any port, harbour, dock or inland water, natural or artificial, and the damage *causes actual danger of inundation* ; or

(*c.*) any bridge (whether over any stream of water or not) or any viaduct, or aqueduct, over or under which bridge, viaduct or aqueduct any highway, railway or canal passes, and the damage is done *with intent and so as to render such bridge*, viaduct or aqueduct, or the highway, railway or canal passing over or under the same, or any part thereof, *dangerous or impassable* ; or

(*d.*) a railway damaged with the intent of rendering and so as to render such railway *dangerous or impassable.* R.S.C., c. 168, ss. 13, 32 and 49 ; c. 32, s. 213.

(*B.*) **To fourteen years' imprisonment,** if the object damaged be—

(*a.*) a ship in distress or wrecked, or any goods, merchandise or articles belonging thereto ; or

(*b.*) any cattle or the young thereof, and the damage be caused by killing, maiming, poisoning or wounding.

(*C.*) **To seven 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 or belonging to a dwelling-house, injured to an extent exceeding in value five dollars ; or

(*b.*) a post letter bag or post letter ; or

(*c.*) any street letter box, pillar box or other receptacle established by authority of the Postmaster-General for the deposit of letters or other mailable matter ; or

(*d.*) any parcel sent by parcel post, any packet or package of patterns or samples of merchandise or goods, or of seeds, cuttings, bulbs, roots, scions or grafts, or any printed vote or proceeding, newspaper, printed paper or book or other mailable matter, not being a post letter, sent by mail ; or

(*e.*) any property, real or personal, *corporeal or incorporeal*, for damage to which no special punishment is by law prescribed, damaged *by night* to the value of twenty dollars. R.S.C., c. 168, ss. 22, 23, 38 and 58 ; c. 35, ss. 79, 91, 96 and 107 ; 53 V., c. 37, s. 17.

(*E.*) **To two years' imprisonment,** if the object damaged be—

(*a.*) any property, real or personal, *corporeal or incorporeal*, for damage to which no special punishment is by law prescribed, damaged to the value of twenty dollars. R.S.C., c. 168, ss. 36, 42 and 58 ; 53 V., c. 37, s. 17.

Wilfully destroying or damaging a dwelling-house, ship, or boat.—Art. 499A *a.*). To render an offender liable under this clause, the destruction or damage to the house, ship, or boat must be wilful ; the means used must be an explosion ; there must be some person in the dwelling-house, ship, or boat at the time ; and there must be actual danger to life.

If the means used be not an explosion, and if no person be in the house, ship, or boat, at the time, and there be no actual danger to life, the offence will come under clause D (*e*), if the offence be committed in the night, or under clause E (*a*), if committed in the day.

If the object damaged be a ship in distress, or wrecked, and there be no person in it, and no actual danger to life, the offence will come under clause B (*a*); and if it be a ship which is not in distress or wrecked, and if there be no person in it, and no actual danger to life, the offence will then come under clause C (*a*), provided the act be done with intent to destroy or render the ship useless.

A person is deemed to have acted *wilfully*, when he has caused anything to happen by an act which he knew would probably cause it, and was reckless whether the thing happened or not. (See article 481, *ante*.)

Wilfully destroying or damaging sea or river banks, etc.—(Art. 499, A *b*). To render an offender liable under this clause, the act done must cause actual danger of inundation, that is to say, that some adjoining land was put in danger of being overflowed.

If the act done causes no actual danger of inundation, the offence will come under clause C (*c*).

Wilfully destroying or damaging bridges, etc,— (Art. 499, A *c*). This clause is to the same effect as the Imperial statute sec. 33 of 24–25 Vic., c. 97. To render an offender liable under it, the act done must be with intent and so as to render the bridge, *etc.*, or the highway, railway or canal passing over or under it, *dangerous* or *impassable*.

The term "*bridge*" conveys the idea of a passage by which travellers are enabled to pass over streams and other impediments. Under the common law, it was, in general, essential that, to constitute it a bridge, the structure should have a footway and be built across such a stream of water, as answers to the description of *flumen vel cursus aquæ*, that is, water flowing in a channel between banks, more or less defined. So that, for instance, where the county of Oxford was indicted for not repairing some arches in a raised causeway which, though built over solid meadow ground, was the continuation of a bridge over a river, the arches themselves being three hundred feet from the foot of the bridge, it was held that there was not sufficient to shew that these arches were bridges such as the county was liable to repair, because they were not over a stream of water, and it was not found by the jury either that they were erected at the same time as the river bridge, or that they were erected for the purpose of enabling the public to pass. (1)

Clause A (*c*), however, covers *any* bridge, *whether over a stream of water or not*.

Wilfully destroying or damaging cattle.—(Art. 499 B *b*). This clause is to the same effect as sec 40 of the Imperial statute, 24–25 Vict., c. 97, except that the latter contains the word *maliciously*.

The act of wilfully destroying by killing, or of wilfully destroying or damaging by maiming, poisoning, or wounding, constitutes this offence, independently of any intention to steal the animal or any part of it.

The killing of any cattle with intent to steal its carcase, skin, *etc.*, is also punishable by fourteen years imprisonment, by the terms of articles 307 and 331, *ante*, pp. 286 and 305.

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 applies to *one* animal as well as to many. (Art. 3 (*d*), *ante*.)

The particular species of cattle killed, maimed, poisoned, or wounded, should be specified in the indictment; (2) for, although article 613 (*g*) *post*, provides that an indictment shall not be deemed objectionable or insufficient, on the ground that it does not name or describe with precision any person place or thing, that article contains a clause empowering the court to order the prosecutor to furnish particulars further describing any person, place or thing mentioned in the indictment

(1) R. v. Oxfordshire, 1 B. & Ad. 289, 297. See, also, R. v. Gloucestershire, 1 C. & M. 506; R. v. Whitney, 3 A. & E. 69; 7 C. & P. 208; 4 L. J. (M. C.) 86; R. v. Derbyshire, 2 G. & D. 97; 11 L. J. (M. C.) 51.

(2) R. v. Chalkley, R. & R. 258.

Under the English statute, the act of killing, etc., must be proved to have been done *maliciously*, though it need not be proved to have been done with *malice to the owner* of the cattle.(1) With us, it must be proved that it was done *wilfully*; and a person is deemed to have acted *wilfully* when he causes anything to happen by an act which he knows will probably cause it, and is reckless whether it happens or not (See art. 481, *ante*). Between this definition of the word *wilfully* and the meaning of the word *maliciously*, as used in the English statute, there seems, however, to be little or no difference. For, where, upon an indictment for unlawfully and *maliciously* killing a mare, it was proved that the prisoner caused the death of the mare through injuries inflicted by inserting the handle of a fork into her vagina, and the jury found that the prisoner was not actuated by any motive except the gratification of his own depraved taste, and that he did not intend to kill the mare, but knew that what he was doing would or might kill her, and nevertheless did what he did recklessly, and not caring whether the mare was injured or not, it was held that there was sufficient malice, and that his conviction was right (2)

Upon an indictment for administering sulphuric acid to a horse, evidence of other acts of administering poison to cattle was allowed, in order to shew the prisoner's guilty intent. (3)

To constitute a *maiming*, the injury inflicted on the animal must be a *permanent* one. (4)

Where it is a *wounding* that is alleged, the injury or damage inflicted upon or done to the animal need not be a permanent one. In one case, the wounding proved was the driving a nail into the frog of a horse's foot, but it appeared that the horse was likely to recover, and it was objected that no wounding was within the meaning of the statute, unless it was such a wounding as was productive of permanent injury to the animal wounded. The judges, however, held that the wounding need not be one producing a permanent injury, inasmuch as the legislature used the word "*wounding*" as contradistinguished from *maiming*, which *is* a permanent injury. (5)

Where, upon an indictment for killing, wounding and maiming a mare, it appeared that the defendant poured nitrous acid into her ears, some of which acid ran into her eye or was poured into it, and blinded her: upon which the owner killed her; and it appeared from the evidence of the surgeons that the injuries done to the mare's ears were wounds; the defendant was convicted of maiming: and the judges held the conviction right. (6)

Upon an indictment for setting fire to a cow-house in which was a cow, which was burnt to death, Taunton, J, held that the prisoner could be convicted of killing the cow. (7)

It is not necessary that, to constitute a wounding within the meaning of this article, any instrument should be used, but it may be a wounding inflicted by the hand alone. (8)

See articles 500 and 502, *post*, as to attempts and written threats to kill or injure cattle.

As to cruelty to animals (inclusive of cattle), see articles 512, and 514, *post*.

Wilfully destroying or damaging agricultural or manufacturing machines, etc.—(Art. 499 C *i*). The destruction or damage must be done, not only wilfully, but also with intent to render the machine or implement useless.

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(1) R. v. Tivey, 1 Den. 63; 1 C. & K. 704.
(2) R. v. Welch, 1 Q. B. D. 23; 45 L. J. (M. C.) 17.
(3) R. v. Mogg, 4 C. & P. 364.
(4) R. v. Jeans, 1 C. & K. 539.
(5) R. v. Haywood, 2 East, P. C. 1076; R. & R. 16.
(6) R. v. Owens, 1 Mood. C. C. 205.
(7) R. v. Haughton, 5 C. & P. 559.
(8) R. v. Bullock, L. R., 1 C.C.R., 115; 37 L. J. (M. C.) 47.

Upon an indictment for breaking a threshing machine, Patterson, J., allowed the prisoner's counsel to ask whether the mob had not compelled several persons to join them, and obliged each to give a blow with a sledge-hammer to every machine that was broken ; and he also allowed the witnesses to prove that the prisoner had been forced by the mob to join them, and that he had resolved to escape on the first opportunity. (1) See as to compulsion by threats, article 12, and comments thereon at pp. 12 and 13, *ante*.

The destruction of any part of a threshing machine which has been taken to pieces and separated by the owner is punishable under this clause ; (2) and so is the destruction of a water-wheel by which a threshing machine is worked. (3) Even if the sides of the machine be wanting, without which it will only work imperfectly, it will be within the meaning of the above clause. (4) But it has been held, that where the machine had been taken to pieces and in part destroyed by the owner, from fear, the remaining parts did not constitute a machine. (5)

It is not necessary that the damage done should be of a permanent kind. Therefore, where it was shewn, upon an indictment for damaging a steam-engine, that the prisoner had screwed up parts of the engine, so that, while so screwed up, they would not work, and that he had reversed the plug of the pump which supplied the engine with water, and that the engine was thus rendered *temporarily* useless and liable to burst, but that the prosecutor discovered the state of the engine and loosened the screws and properly replaced the plug before any *permanent* damage was done, it was held that the prisoner was properly convicted. (6)

And, where a prisoner, in company with some other persons, unfastened and took away a certain part,—called the ***half-jack***,—of a machine, called a stocking-frame, without which the frame was useless, but did no further injury either to the half-jack or to the frame, than the removal of the half-jack, the judges held that this was a damaging of the frame, as it made the frame imperfect and inoperative. (7)

Wilfully destroying or damaging trees, etc., in a park, etc.—(Art. 499 D *a*). It has been held that the words "adjoining any dwelling-house" import *actual contact*, and, that, therefore, ground separated from a house by a narrow walk and paling, wall, or gate is not within their meaning. (8)

The amount of injury done means the actual injury done to the tree, etc, itself, and does not extend to *consequential* injury resulting from the act of the defendant ; and, so, where the actual injury done to the tree, etc., damaged by the defendant, was less than the value of five dollars, but it appeared that it would, in consequence of the damage done, be necessary to stub up and replace part of an old hedge at an expense greater than five dollars, it was held to be insufficient (9) But, if several trees, etc., be destroyed or damaged, at the same time, or so continuously as to form one transaction, and the actual injury done to them amounts in the aggregate to more than five dollars, it will be sufficient. (10)

It has been held that one who cuts off a portion of his neighbour's trees to protect his own property from the nuisance caused by boys throwing stones at

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(1) R. v. Crutchley, 5 C. & P. 133.
(2) R. v. Mackerel, 4 C. & P. 448.
(3) R. v. Tidler, 4 C. & P. 449
(4) R. v. Bartlett, 2 Deacon, C. L. 1517.
(5) R. v. West, 2 Deacon, C. L. 1518.
(6) R. v. Fisher, L. R , 1 C. C. R., 7 ; 35 L. J. (M. C.) 57.
(7) R. v. Tacey, R. & R. 452.
(8) R. v. Hodges, M. & M. 341.
(9) R. v. Whiteman, Dears, 353 ; 23 L. J. (M. C.), 120.
(10) R. v. Shepherd, L. R., 1 C.C.R., 118 ; 37 L J. (M. C.) 45 ; Arch. Cr. Pl. & Ev. 21 Ed. 421, 635.

the blossoms on such trees, and to secure the entrance of air and light to his own dwelling, cannot be said to be acting under a fair and reasonable supposition that he has a right to do the acts complained of. (1)

As to injuries to trees, etc., growing anywhere but in a park, &c. and to which the damage done amounts to twenty five cents, see art 508 *post*.

Wilfully destroying or damaging any real or personal property by night. - Art. 599 D *e*.) The actual injury done must amount to the value of twenty dollars, and the offence must be committed *at night* If the offence be committed during the day, it will, instead of being punishable under this clause, by *five* years' imprisonment, come under clause E (*a*), and be punishable with two years' imprisonment.

"*Night*" is the period between nine o'clock in the evening and six o'clock of the following morning. (Art. 3 (*q*.), *ante*, p. 4.).

In an indictment for damaging several articles of personal property, at one time, it is not necessary to allege separately the value of each article injured, but it will be sufficient to allege that the amount of damage done to them is twenty dollars in the aggregate. (2)

The soil of a town moor was vested in the corporation of the town, in fee, but *free-men* were entitled. under statute, to the "full right and benefit to the herbage" of the moor, for pasturing cows ; and it was held that, the freehold estate of the moor being vested in the corporation, the right of the *free-men* to the herbage was not "any real and personal property whatever," within the meaning of sec. 52 of the Imperial statute, (relating to malicious injuries to property), which only applies to *tangible* property and not to mere incorporeal rights, such as rights of pasture. (3) The principle of this decision, however, is not applicable to clauses D (*e*.), and E (*a*.) of Art. 499 ; for these clauses expressly include *corporeal* and *incorporeal* property.

As the act of the offender must be done wilfully, it was held, in a case where the defendant threw, at some people with whom he had been fighting, a stone which struck and broke the windows of a house, that he was wrongly convicted of unlawfully and maliciously committing damage, although it was intimated that, if the jury had found that the defendant knew that the window was where it was, when he threw the stone, and that he was likely to break it, and was reckless whether he did so or not, the decision might have been different. (4)

It has been held that a person gathering mushrooms growing in their natural state in a field, and doing no other damage or injury, does not thereby "*wilfully* or *maliciously*" commit damage, injury or spoil to or upon real or personal property, within the meaning of 24 and 25 Vict., c. 97, s. 52. (5)

As to all other injuries to real or personal property, irrespective of the amount of damage, see article 511, *post*.

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

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(1) Hamilton v. Bone, 16 Cox C.C. 437 ; Burb. Dig. Cr. L. 476.
(2) R. v. Thoman, 12 Cox, (C.C.R.) 54.
(3) Laws v. Eltringham, 8 Q. B. D. 283 ; 51 L. J. (M. C.) 13.
(4) R. v. Pembliton, L. R., 2 C. C. R., 119 ; 43 L. J (M. C.) 91. See R. v. Welch, cited at p. 445, *ante*.
(5) Gardner v. Mansbridge, L. R., 19 Q. B. D., 217 ; Burb. Dig. Cr. L. 476.

(*b.*) places poison in such a position as to be easily partaken of by any such animal. R.S.C , c. 168, s. 44.

See comments upon art. 499 B (*b*) *ante*, p.p. 444 and 445.

See also art. 64, and comments at p.p. 40 and 41, *ante*, as to attempts.

501. Injuries to animals, not being cattle.—Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding one hundred dollars over and above the amount of injury done, or to three months' imprisonment, with or without hard labour, who wilfully kills, maims, wounds, poisons or injures any dog, bird, beast, or other animal, not being cattle, but being either the subject of larceny at common law, or being ordinarily kept in a state of confinement, or kept for any lawful purpose.

2. Every one who, having been convicted of any such offence, afterwards commits any offence under this section, is guilty of an indictable offence, and liable to a fine or imprisonment, or both, in the discretion of the court. R.S.C., c. 168, s. 45; 53 V., c. 37, s. 16.

The imprisonment under clause 2 of this article will be five years. (See art 951, *post*).

See article 304, *ante*, p. 269, as to animals capable of being stolen : and see also the remarks of the Royal Commissioners, on the subject, at p p. 267 and 268, *ante*.

502. Threats to injure cattle.—Every one is guilty of an indictable offence and liable to two years' imprisonment who sends, delivers or utters, or directly or indirectly causes to be received, knowing the contents thereof, any letter or writing threatening to kill, maim, wound, poison, or injure any cattle. R.S.C., c. 173, s. 8.

503. Injuries to poll books, etc.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who wilfully—

(*a.*) destroys, injures or obliterates, or causes to be destroyed, injured or obliterated ; or

(*b.*) makes or causes to be made any erasure, addition of names or interlineation of names in or upon—

any writ of election. or any return to a writ of election, or any indenture, poll-book, voters' list, certificate, affidavit or report, or any document, ballot or paper made, prepared or drawn out according to any law in regard to Dominion, provincial, municipal or civic elections. R.S.C., c 168, s. 55.

504. Injuries to buildings, etc., by tenants.—Every one is guilty of an indictable offence and liable to five years' imprisonment, who, being possessed of any dwelling-house or other building, or part of any dwelling-house or other building which is built on lands subject to a mortgage or which is held for any term of years or other less term, or at will, or held over after the termination of any tenancy, wilfully and to the prejudice of the mortgagee or owner—

(*a.*) pulls down or demolishes, or begins to pull down or demolish the same or any part thereof, or removes or begins to remove the same or any part thereof from the premises on which it is erected ; or

(*b.*) pulls down or severs from the freehold any fixture fixed in or to such dwelling-house or building, or part of such dwelling-house or building.

As to thefts of fixtures, etc., by tenants, see Article 322, *ante*.

505. Injuries to land-marks, etc.—Every one is guilty of an indictable offence and liable to seven years' imprisonment, who *wilfully* pulls down, defaces, alters or removes any mound, land mark, post or monument *lawfully* erected, planted or placed to mark or determine the boundaries of any province, county, city, town, township, parish or other municipal division. R.S.C., c. 168, s. 56.

506. Every one is guilty of an indictable offence and liable to five years' imprisonment, who *wilfully* defaces, alters or removes any mound, land mark, post or monument *lawfully* placed by any land surveyor to mark any limit, boundary or angle of any concession, range, lot or parcel of land.

2. It is not an offence for any land surveyor in his operations to take up such posts or other boundary marks, when necessary, if he carefully replaces them as they were before. R.S.C., c. 168, s. 57.

507. Injuries to fences, etc.—Every one is guilty of an indictable offence and liable, on summary conviction, to a penalty not exceeding twenty dollars over and above the amount of the injury done, who *wilfully destroys or damages* any fence, or any wall, stile or gate, or any part thereof respectively, or any post or stake planted or set up on any land, marsh, swamp or land covered by water, on or as the boundary or part of the boundary line thereof, or in lieu of a fence thereto.

2. Every one who, having been convicted of any such offence, afterwards commits any such offence is liable, on summary conviction, to three months' imprisonment with hard labour. R.S.C., c. 168, s. 27; 53 V., c. 38, s. 15.

See comments under Art. 478, *ante*, p. 432, as to second offences.

507A. Injuries to Harbor Bars.—Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding fifty dollars, who *wilfully* and *without* the *permission of the Minister of Marine and Fisheries* (the burden of proving which permission shall lie on the accused), removes any stone, wood, earth or other material forming a natural bar necessary to the existence of a public harbour, or forming a natural protection to such bar. (As amended by 56 Vic., c. 32.)

508. Injuries to trees, etc., wheresoever growing.—Every one is guilty of an offence and liable, on summary conviction, to a penalty

not exceeding twenty-five dollars over and above the amount of the injury done, or to two months' imprisonment with or without hard labour, who *wilfully destroys or damages* the whole or any part of any tree, sapling or shrub, or any underwood, *wheresoever the same is growing*, the injury done being to the amount of twenty-five cents, at the least.

2. Every one who, having been convicted of any such offence, afterwards commits any such offence is liable, on summary conviction, to a penalty not exceeding fifty dollars over and above the amount of the injury done, or to four months' imprisonment with hard labour.

3. Every one who, having been twice convicted of any such offence, afterwards commits any such offence, is guilty of an indictable offence and liable to two years' imprisonment. R.S.C., c. 168, s. 24.

See comments under Article 478, *ante*, p 432, as to second offences.

509. Injuries to vegetable productions growing in gardens, orchards, etc.—Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty dollars over and above the amount of the injury done, or to three months' imprisonment with or without hard labour, who *wilfully* destroys, or damages with intent to destroy, any vegetable production growing in any garden, orchard, nursery ground, house, hot-house, green-house or conservatory.

2. Every one who, having been convicted of any such offence, afterwards commits any such offence is guilty of an indictable offence, and liable to two years' imprisonment. R.S.C., c. 168, s. 25.

See Article 478 and comments, as to second offences, at p. 432, *ante*.

510. Injuries to cultivated roots and plants not growing in a garden, etc.—Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding five dollars over and above the amount of the injury done, or to one month's imprisonment with or without hard labour, who *wilfully* destroys, or damages with intent to destroy, any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture, and growing in any land, open or inclosed, *not being a garden*, orchard or nursery ground.

2. Every one who, having been convicted of any such offence, afterwards commits any such offence is liable, on summary conviction, to three months' imprisonment with hard labour. R.S.C., c. 168, s. 26.

See comments under Art. 478, *ante*, p. 432, as to second offences.

511. Injuries not otherwise provided for.—Every one who *wilfully* commits any damage, injury or spoil to or upon any *real or personal property* either *corporeal* or *incorporeal*, and either of a public or private nature, for which no punishment is hereinbefore provided, is guilty of an offence and liable. on summary conviction, to a pen-

alty 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.

See comments under clause D (*e*) of Article 499, *ante*, p. 447.

PART XXXVIII.

CRUELTY TO ANIMALS.

512. 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 *unneccessarily* beats, binds, illtreats, abuses, overdrives or tortures any cattle, poultry, dog, domestic animal or bird; 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.

The expression "cattle" includes any horse, mule, ass, swine, sheep, or goat, as well as neat cattle or animal of the bovine species and by whatever technical or familiar name known, and applies to one animal as well as to many. (Art. 3 (*d.*) *ante*).

This offence is a statutory one. It was not an offence at common law; and the statutes upon the subject are of comparatively recent origin.

With regard to the meaning of the words, "*wanton*" and "*cruel*", any act, which is unjustifiable by the circumstances, is wanton; and cruelty exists

whenever the animal is subjected to unnecessary pain or suffering. But the mere infliction of some bodily pain will not, of itself, constitute the offence. There must be not only some ill-usage, from which the animal suffers, but the ill-usage must be without any *necessity*, actually existing or honestly believed to exist. (1) If there be a necessity for it, or a reasonable ground for believing that there is a necessity for it, there will be no offence. The most common case to which the law would apply is that in which an animal is cruelly beaten or tortured for the mere purpose of causing pain, or for the gratification of a malignant or vindictive temper although other cases may be suggested, which would be within the meaning of the law. Thus, cruel and unnecessary beating or torture in training or correcting an intractable animal; pain inflicted in wanton or reckless disregard of the suffering it occasioned, and so excessive in degree as to be cruel; torture inflicted by mere inattention and criminal indifference to the agony resulting from it, as in the case of an animal confined and left to perish from starvation, would undoubtedly be punishable.

The mere inconvenience and discomfort attendant upon the transporting of animals from one place to another, by rail or by water, does not constitute cruelty. And a surgeon who performs, upon an animal, some operation which he honestly believes to be of benefit to the animal, will be guilty of no offence, un derthe above Article, although the performance of the operatiou may cause the animal severe pain and suffering. (2).

Nor does the law interfere with the infliction of any chastisement which may be necessary for the training or discipline of animals; but the chastisement must not be excessive. Chastisement resorted to in good faith and for a proper purpose will not, in general, be deemed excessive; but, if the chastisement is unduly severe, it may be taken into consideration by the jury in determining whether or not it was prompted by a malevolent spirit, and not by a justifiable motive. Chastisement of an animal is not so restricted as that which a parent or a master is entitled to exercise over his child or his pupil. The parent or master is liable to punishment, if, in chastising his child or his pupil, he exceed what is moderate and reasonable; but, in the case of an animal, there is no liability for any such excess, unless it be such an excess as is unnecessary and wantonly cruel. In an American case, under a statute making it an offence to "*needlessly mutilate or kill any living creature*," the proof shewed that the defendant had, in his own corn-field, killed his neighbor's small pig, with one blow of a club, thereby producing immediate death. The pig with others had been in the habit of trespassing in the defendant's corn-field; and the defendant had repeatedly requested its owner to pen it up or keep it out of the field, which the owner did for a while; and then she turned all the pigs out again. There were no more circumstances of cruelty than the taking of life at one blow. The court refused the request of the defendant's counsel that the jury should be instructed, *first*, that a "*needless*" killing meant a killing in *mere idle wantonness*, without being in any sense beneficial or useful to the accused; *second*, that the jury were to determine whether or not it was "*needless*," and, that, for that purpose, they might consider the facts of the pig being found in the corn-field and its having been frequently there before; *third*, that they must find, before convicting, that there was no necessity or cause whatever to kill the animal; *fourth*, that if the jury found that the animal was destroying the accused's crops, and that he had used all reasonable means to prevent it, and that the act of killing did prevent it, they would be warranted in finding that it was not *needless*; *fifth*, that the word "needless" related to a wanton and cruel act, and not to one which was the result of necessity or reasonable cause; and, *sixth*, that unless the accused was guilty of wanton and needless acts of cruelty to the pig, resulting in unjustifiable pain, they should acquit. But the court, of its own motion, told the jury that, if the accused *needlessly* killed the pig, they should convict, notwithstanding it may have been trespassing within the corn-field at the time; and that "'*needlessly*' means *without necessity*, or *unnecessarily*, as where one kills a domesticated animal of another, either in mere want-

(1) Budge v. Parsons, 7 L. T. 184; 11 W. R. 424, 3 Best & S. 385; Swan v. Saunders, 14 Cox C. C. 566; 50 L. J. (M. C.) 67: 44 L. T. 428.

(2) Com. v. Lufkin, 7 Allen, (Mass.) 579.

onness or to satisfy a depraved disposition, or for sport or pastime, or to gratify one's anger, *or for any other unlawful purpose.*" It was held error in the court to refuse the instructions asked, except the last, (the sixth), of which it was said that "a needless killing could not be justified by an easy death; cruelty was no part of the charge, although made criminal under other sections." It was also held that: "All acts of killing which are unlawful are not '*needless*,' in the meaning of the statute. A man, for instance, might kill his neighbor's sheep for food, which would be *unlawful*, and either a trespass or felony, according to the circumstances; but such killing could not, with any show of reason, come within the intention of the act in question. The lawfulness or unlawfulness of the act has really no bearing upon its character as charged." It was also said, even though the last clause had been omitted, it would not have cured the error in refusing the charge asked by the accused, for "he was entitled to have them particularly impressed upon the jury in a matter which, being new, they might misapprehend." In defining the word "*needless*" the court said: "From the view we have taken of the nature and scope of this class of acts, it is obvious that the term '*needless*' cannot be reasonably construed as characterizing an act which might by care be avoided. It simply means an act done without any useful motive, in a spirit of wanton cruelty, or for the mere pleasure of destruction." And it was added that the accused ought not to be convicted "if he had some useful object in the killing, such as the protection of his wheat and corn." (1)

In another case, a farmer was indicted for "needlessly torturing and mutilating" a dog. The proof showed that the accused had for some time been annoyed by a dog, or some other animal, invading his premises at night, and breaking up the nests of his hens, sucking the eggs and disturbing his poultry. He suspected his father's dog, and had no suspicions of the dog injured, whose master lived a quarter of a mile distant. The accused borrowed a steel-trap, set it in a bucket of slop, placed the latter in his garden, and tied the trap to a post. In the night the dog injured was caught in this trap by his tongue and a part of it torn out, permanently injuring it, so that it could scarcely bark. This dog was in the habit of raiding the other neighbors' premises. The accused was held not guilty. "There can be no doubt, we think, that in doing so his object was, by catching the animal, to protect his property and relieve his premises from these depredations, and not for the purpose of inflicting needless torture upon the animal. There was no testimony going to show that the slop used by the defendant was such as was calculated or likely to lure dogs or other animals away from the premises where they belonged on to his premises or within his enclosure. The defendant had a right to protect his premises against such invasions, and to adopt such means as were necessary for that purpose. And if a night-prowling dog, in the habit of invading premises and breaking up hens' nests and sucking the eggs, while so transgressing, is caught in a steel-trap, though set by the owner for that purpose, and then suffers pain or mutilation, we are not prepared to say that it would be needless torture or mutilation, within the meaning of the statute. * * * While the statute's object was to prevent cruelty to animals, and it was intended as a humane provision for their protection, it was not intended to deprive a man of the right to protect himself, his premises and property against the intrusions of worthless, mischievous and vicious animals by such means as are reasonably necessary for that purpose. The object of the statute was to protect animals from wilful or wanton abuse, neglect or cruel treatment, and not from the incidental pain or suffering that may be casually or incidentally inflicted by the use of lawful means of protection against them." (2)

Where the prevention of cruelty and suffering is concerned there is plainly a difference between *instantaneous* death and *lingering* death; the former being generally, if not always, painless. In favor of those sports which are considered healthful recreations and exercise, tending to promote strength

(1) Grise v. State, 37 Ark. 456.
(2) Hodge v. State, 11 Lea (Tenn.) 528; S. C. 47 Am. Rep. 307.

bodily agility, and courage, even the pain which comes with a lingering death in the lower animals is often disregarded in the customs and laws of human and highly civilized people; so, that the angler, who catches fish for pastime, or the marksman who, as an exercise of skill, or as a diversion, shoots pigeons as they fly wild in the woods is not considered guilty of any violation of the essential objects of the law in question.

The cutting of the combs of cocks in order to fit them for cock-fighting or winning prizes at exhibitions was held by Kelly, C. B., to be cruelty, abuse, and ill-treatment; (1) and so was the dishorning of cattle, in reference to which Coleridge, C. J., said, "*Abuse* of the animal means substantial pain inflicted upon it, and '*unnecessary*' means that it is inflicted, without necessity, and under the word '*necessity*' I should include adequate and reasonable object. (2)

In another case, however, the Court of Common Pleas held that dishorning cattle was not forbidden by the statute against cruelty. (3)

To turpentine a goose and then set it on fire is cruelty. (4) So it is to plunge a hog, (which is being slaughtered), into boiling hot water, after it has been stuck, and before it is dead. (5)

It has been said that whenever the purpose for which the act is done is to make the animal more serviceable for the use of man, the law ought not to be held to apply. And, so, the castration of horses or other animals or the spaying of sows has been held not to be cruelty, if done with reasonable care and skill, even though it be a mistaken idea that it improves them. (6)

In a prosecution for cruelty, the question is Did the accused intend to do the act which caused the pain? Thus, where the accused, while hauling lumber, after trying to get a balky horse to pull, picked up a stick, four feet in length and two inches thick, and struck the horse on the head and instantly killed it, the court held him guilty of *cruelly killing* an animal, and refused to enquire into the motive he had in striking the blow namely, to make the horse pull. (7)

With regard to overdriving, if an injury be inflicted, the overdriving must be wanton. If the driver, while honestly exercising his judgment, happen to err, he is not guilty. An error of judgment is to be distinguished from mere recklessness of consequence or wilful cruelty. (8)

It must appear from the evidence that the accused did the act knowingly. Thus, in a colliery, certain horses were worked, while suffering from raw wounds. T. was the owner of the colliery, and S. the certificated manager, but neither was proved to have been present or to have had any notice or knowledge of the condition of the horses They were acquitted, the court holding that some knowledge of the matter was essential to the commission of the crime. (9)

No one can be excused by shewing that he was authorized by another to inflict a cruel injury. And, so, a conductor and a street-car driver are liable for over-loading a street-car, even though directed to do so by a superior officer of the street-car company. (10)

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(1) Murphy v. Manning, L. R., 2 Exch. Div. 312.
(2) Ford v. Wiley, L. R., 23 Q. B. D. 203.
(3) Callaghan v. Society, etc., 11 Cox C.C. 101; and see Brady v. McArgle, 14 L. R. (Irish) 174; 15 Cox, C.C. 516.
(4) State v. Branner, 111 Ind. 98
(5) Davis v. Soc. for Prev. of cruelty, 16 Abb. (N. Y.) Pr. N. S., 73.
(6) Lewis v. Fermer, L. R. 18 Q. B. D. 532.
(7) State v. Hackfath, 20 Mo. App. 614, S. C., 2 West. Rep. 588.
(8) Com. v. Wood 111 Mass. 408.
(9) Small v. Warr, 47 J. P. 20; People v. Brunnell, 48 How, (N. Y.) Pr. 436.
(10) People v. Tinsdale, 10 Abb. (N. Y.) Pr., N. S., 374.

Cruelty usually results from an act done; but there are instances where cruelty may arise from a failure to perform an act. A *failure to kill a wounded* animal in great pain and incurable is *not* "cruelty." (1) But if an animal, a horse, for instance, is fatally diseased, and its owner or keeper turns it into a field to feed on the pasturage, and it has to go about in great pain in its efforts to get food in order to support its life, such owner or keeper is guilty of torturing, or causing it to be tortured, the same as if he had tortured it with his own hand. (2) But where the owner of parrots sold ten and put them in a box, and some corn with them, to ship a long distance, providing no water for them, and ten hours afterward, at an intermediate station, they were found making a fuss, three being down on the floor, and the person so finding them gave them two saucers of water, which they drank with evident great relish and seemed refreshed; the person shipping them was held not guilty of cruelty, that the mere non-supply of water was not sufficient evidence of cruelty. (3)

See article 499 clause B (*b*,) and comments at pp. 444 and 445 *ante*.

Section 7 of R.S.C., c. 172, is unrepealed, (See Schedule Two, *post*), and is as follows:

"Every pecuniary penalty recovered, with respect to any such offence shall be applied in the following manner, that is to say: one moiety thereof to the corporation of the city, town, village, township, parish or place in which the offence was committed, and the other moiety, with full costs, to the person who informed and prosecuted for the same, or to such other person as to the justices of the peace seems proper."

No prosecution for any offence, under articles, 512, 513, 514 and 515, can be commenced after the expiration of three months from its commission. (See Art. 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 such cock-pit is situated. R.S.C., c. 172, s. 3.

514. Treatment of cattle while in transit by rail or water.—No railway company within Canada whose railway forms any part of a line of road over which cattle are conveyed from one province to another province, or from the United States to or through any province, or from any part of a province to another part of the same, and no owner or master of any vessel carrying or transporting cattle from one province to another province, or within any province, or from the United States through or to any province, shall confine

(1) Powell v. Knights, 38 L. T. 607; 26 W. R. 721.
(2) Everitt v. Davis, 38 L. T. 360; 26 W. R. 332.
(3) Swan v. Saunders, 14 Cox C. C. 566.

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.

515. Any peace officer or constable may, at all times, enter any premises where he has reasonable ground for supposing that any car, truck or vehicle, in respect whereof any company or person has failed to comply with the provisions of the next preceeding section, is to be found, or enter on board any vessel in respect whereof he has reasonable ground for supposing that any company or person has, on any occasion, so failed.

2. Every one who refuses admission to such peace officer or constable is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty dollars and not less than five dollars, and costs, and in default of payment, to thirty days' imprisonment. R.S.C., c. 171, s. 12.

PART XXXIX

OFFENCES CONNECTED WITH TRADE, AND BREACHES OF CONTRACT.

516. Conspiracy in restraint of trade.—A conspiracy in restraint of trade is an agreement between two or more persons to do or procure to be done any *unlawful act* in restraint of trade.

See general comments on conspiracy, under Article 394 *ante*, p. 335. See also Article 527, *post*.

517. What acts in restraint of trade are not unlawful.—The purposes of a trade union are *not*, by reason merely that they are in restraint of trade, *unlawful*, within the meaning of the next preceding section. R.S.C., c. 131, s. 22.

The expression "Trade Union" means such combination, whether temporary or permanent, for regulating the relations between workmen and masters, or for imposing restrictive conditions on the conduct of any trade or business, as would, but for this Act, have been deemed to be an unlawful combination by reason of some one or more of its purposes being in restraint of trade. (Sec. 2 of "*The Trade Unions Act*," R.S.C., c. 131.)

The law of England in regard to combinations of workmen organized for the purpose of raising wages, shortening the hours of labor, dictating to masters what workmen they shall employ and so forth, was formerly regulated by the common law relating to conspiracy, by various statutes, (including the 6 Geo. 4, c. 129, the 22 Vict. c. 34, and the 24 and 25 Vict. c. 100, sec. 41), and by the judicial decisions which were rendered from time to time in a number of cases which arose upon the subject. (1)

Complaints on the part of the working classes that the law as it stood prevented them from entering into reasonable combinations, for the purpose of employing their time and skill to the best advantage, led to a change, by the passing of chapter 31 of 34 and 35 Vict.; sec 2 of which declared that the purposes of any trade union should not be deemed unlawful by being merely in restraint of trade; and by the passing of chapter 32 of 34 and 35 Vict.; sec. 7 of which repealed the old statutes. The 34 and 35 Vict., chap. 32, however, specified, as unlawful, certain special acts which often occur in the course of disputes between masters and workmen, and affixed to them appropriate punishments.

Although, after the passing of the 34 and 35 Vict., c. 32, no indictment would lie for conspiracy to do any act on the mere ground of its being in restraint of the free course of trade, unless it was one of the special acts mentioned in the statute itself, as punishable, it was held nevertheless that an agreement or combination to force, — by improper threats or improper molestation,—a master to conduct his business contrary to his own will, was still an indictable conspiracy; and, further, that there was an improper molestation whenever anything was done with an improper intent, and whenever it was something that would have the effect of annoying or interfering with the minds of ordinary persons carrying on such business as the master carried on. Such an agreement, by improper molestation, to control the master was a conspiracy at common law, and it was held that such an offence was not abrogated by the

(1) For a list of these cases, see Arch. Cr. Pl. and Ev. 21 Ed. 1014.

34 and 35 Vict., c. 32. (1) It was also held that a combination between workmen or servants to hinder or prevent their master from carrying on his business, by means of the workmen or servants simultaneously breaking unexpired contracts of service, into which they had entered with the master, was also an indictable conspiracy, notwithstanding the 34 and 35 Vict., c. 32. (2)

The decision in the case of R v Bunn led to the repeal of the 34 & 35 Vict. c. 32, and to the enactment of the 38 & 39 Vict. c. 86, which, by section 3, declares that "an agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime."

Under our own law, as contained in Article 518, there can be no prosecution for conspiracy in respect of any act done for the purpose of a trade combination, unless the act itself is a punishable offence by statute.

See Articles 523, 524, 525, 526, as to punishable acts of intimidation.

518. Prosecution for conspiracy.—No prosecution shall be maintainable against any person for conspiracy in refusing to work with or for any employer or workman, or for doing any *act* or causing any *act* to be done for the purpose of a trade combination, unless such *act* is an *offence* punishable by statute. 53 V., c. 37, s. 19.

Where the defendants, who were members of a trade union, conspired together to injure a non-unionist workman, by depriving him of his employment, it was held to be a misdemeanor, and not for the purposes of their trade combination, within the meaning of the law. (3)

519. Meaning of expressions, "trade combination," and "act."—The expression "trade combination" means any combination between masters or workmen or other persons for regulating or altering the relations between any persons being masters or workmen, or the conduct of any master or workman in or in respect of his business or employment, or contract of employment or service; and the expression "*act*" includes a default, breach or omission. R.S.C., c. 173, s. 13.

520. Combinations in restraint of trade.—*Every one* is guilty of an indictable offence and liable to a penalty not exceeding four thousand dollars and not less than two hundred dollars, or to two years' imprisonment, and if *a corporation* is liable to a penalty not exceeding ten thousand dollars and not less than one thousand dollars, who conspires, combines, agrees or arranges with any other person, or with any railway, steamship, steamboat or transportation company, *unlawfully*—

(*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

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(1) R. v. Bunn, 12 Cox, 316, 339, 340, per Brett, J., (dissented from in Gibson v. Lawson, [1891], 2 Q. B. 545).

(2) R. v. Bunn, *Id.*

(3) R. v. Gibson, 16 O. R. 704.

(*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. 52 V., c. 41, s. 1.

The defendants, (who were shipowners), agreed that, if persons in a certain trade would deal with them, exclusively, such persons should have certain advantages at their hands, and that if they dealt with any other shipowner, to however small an extent, they should lose all the advantages which they would derive from dealing with defendants. The plaintiffs, who were also shipowners), alleged that this was done for the purpose of injuring them by driving them out of the trade. But the defendants said it was done for the protection of their own trade. *Held*, that the question would be which of these two views was, in fact, true (1)

The above Article, 520, is a re-enactment of section 1 of 52 Vict c. 41; and sections 4 and 5 of the same statute, which are unrepealed, (as will be seen by Schedule Two, *post*), are as follows:

"Where an indictment is found against any person for offences provided against in this Act, the defendant or person accused shall have the option to be tried before the judge presiding at the court at which such indictment is found, or the judge presiding at any subsequent sitting of such court, or at 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.*" (Sec. 4.). (2)

"An appeal shall lie from any conviction under this Act by the judge without the intervention of a jury to the highest court of appeal in criminal matters, in the province where such conviction shall have been made, upon all issues of law and fact; and the evidence taken in the trial shall form part of the record in appeal, and for that purpose the court, before which the case is tried, shall take note of the evidence and of all legal objections thereto." (Sec. 5.)

It is the policy of the law to encourage trade and commerce; and it is against public policy and illegal to enter into a combination or agreement for the purpose of restraining trade, or tending to take it out of the realms of competition; even although it may not appear that the combination or agreement has *actually* produced any result detrimental to public interests. (3)

Where the proprietors of five several lines of boats, engaged in the business of transporting persons and freight on the Erie and Oswego canals, entered into an agreement among themselves, fixing the rates of freight and passage upon their boats, and to divide the net earnings, among themselves, according to certain proportions fixed in the agreement, it was held to be a combination, tend-

(1) Mogul Steamship Co. v. McGregor, L. R. 15 Q. B. D. 476.

(2) For the provisions of the present Code relating to *speedy trials*, see Articles 762-781, *post*.

(3) Santa Clara V. M. & L. Co. v. Hayes, 76 Cal. 387; Atcheson v. Mallow, 43 N. Y. 147.

ing to destroy competition between the several lines engaged in the business, and unlawful. (1)

An association of Manufacturers of wire cloth, formed for the avowed purpose of regulating the price of the commodity, each of the members stipulating, under a heavy penalty, that he would not sell at less than a specified rate, was held to be contrary to public policy, and illegal. (2)

The retail coal dealers of the City of Lockport formed an association called the Lockport Coal Exchange, the main purpose of which was to fix a minimum retail price of coal for the city and vicinity, with the design practically to compel, under prescribed penalties, every coal dealer in the city to join it and regulate his business by its constitution and by-laws, which prohibited soliciting business except as provided therein, and the taking of club orders of associated buyers at reduced prices, and provided for keeping the retail price of coal uniform, so far as practicable, and required a certain vote of the association to change the price. The constitution also provided that no price was to be made amounting to more than a fair and reasonable advance over wholesale rates, or more than the current prices of the coal exchanges at certain designated neighboring cities, when figured upon corresponding freight tariffs; and the retail price of coal actually fixed by the association was a fair price. *Held*, on an appeal to the N. Y. Supr. Ct., that as the purpose and object of the association had a tendency to practically prevent competition in one of the necessaries of life, it constituted a combination in restraint of trade, and that membership in such association would support a conviction on an indictment for conspiracy to commit acts injurious to trade (3)

521. Criminal breaches of contract.—Every one is guilty of an indictable offence and liable on indictment or on summary conviction before two justices of the peace, to a penalty not exceeding one hundred dollars or to three months' imprisonment, with or without hard labour, who—

(*a.*) wilfully breaks any contract made by him knowing, or having reasonable cause to believe, that the probable consequences of his so doing, either alone or in combination with others, will be to endanger human life, or to cause serious bodily injury, or to expose valuable property, whether real or personal, to destruction or serious injury; or

(*b.*) being, under any contract made by him with any municipal corporation or authority, or with any company, bound, agreeing or assuming to supply any city or any other place, or any part thereof, with electric light or power, gas or water, wilfully breaks such contract knowing, or having reasonable cause to believe, that the probable consequences of his so doing, either alone or in 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 Her Majesty's mails, or to carry passengers or freight, or with Her Majesty, or any one on

(1) Hooker v. Vandewater, 4 Den. (N. Y.) 349.
(2) De Witt Wire Cloth Co. v. New Jersey Wire Cloth Co., 14 N. Y. Supp. Rep. 277.
(3) People v. Sheldon and others, S. C., 47 Alb. L J. 185; 15 Cr. L. Mag. [1893], 412.

behalf of Her Majesty, in connection with a Government railway on which Her Majesty's mails, or passengers or freight are carried, wilfully breaks such contract knowing, or having reason to believe that the probable consequences of his so doing, either alone or in combination with others, will be to delay or prevent the running of any locomotive engine, or tender, or freight or passenger train or car, on the railway.

2. Every municipal corporation or authority or company which, being bound, agreeing or assuming to supply any city, or any other place, or any part thereof, with electric light or power, gas or water, wilfully breaks any contract made by such municipal corporation, authority, or company, knowing or having reason to believe that the probable consequences of its so doing will be to deprive the inhabitants of that city or place or part thereof wholly, or to a great extent, of their supply of electric light or power, gas or water, is liable to a penalty not exceeding one thousand dollars.

3. Every railway company which, being bound, agreeing or assuming to carry Her Majesty's mails, or to carry passengers or freight, wilfully breaks any contract made by such railway company, knowing or having reason to believe that the probable consequences of its so doing will be to delay or prevent the running of any locomotive engine or tender, or freight or passenger train or car on the railway, is liable to a penalty not exceeding one hundred dollars.

4. It is not material whether any offence defined in this section is committed from malice conceived against the person, corporation, authority or company with which the contract is made or otherwise. R.S.C., c. 173, ss. 15 and 17.

522. Posting up the provisions of law respecting criminal breaches of contract.—Every such municipal corporation, authority, or company, shall cause to be posted up at the electrical works, gas works, or water-works, or railway stations, as the case may be, belonging to such corporation, authority or company, a printed copy of this and the preceding section in some conspicuous place, where the same may be conveniently read by the public; and, as often as such copy becomes defaced, obliterated or destroyed, shall cause it to be renewed with all reasonable despatch.

2. Every such municipal corporation, authority or company which makes default in complying with such duty is liable to a penalty not exceeding twenty dollars for every day during which such default continues.

3. Every person unlawfully injuring, defacing or covering up any such copy so posted up is liable, on summary conviction, to a penalty not exceeding ten dollars. R.S.C., c. 173, s. 19.

523. Intimidation.—Every one is guilty of an indictable offence and liable, on indictment, or on summary conviction before two justices of the peace, to a fine not exceeding one hundred dollars or

to three months' imprisonment with or without hard labour, who, wrongfully and without lawful authority, with a view to compel any other person to abstain from doing anything which he has a lawful right to do, or to do anything from which he has a lawful right to abstain—

(*a.*) uses violence to such other person, or his wife or children, or injures his property ; or

(*b.*) intimidates such other person, or his wife or children, by threats of using violence to him, her or any of them, or of injuring his property ; or

(*c.*) persistently follows such other person about from place to to place ; or

(*d.*) hides any tools, clothes or other property owned or used by such other person, or deprives him of, or hinders him in, the use thereof; or

(*e.*) with one or more other persons, follows such other person, in a disorderly manner, in or through any street or road ; or

(*f.*) besets or watches the house or other place where such other person resides or works, or carries on business or happens to be. R.S.C., c. 173, s. 12.

This Article is to the same effect as sec. 7 of the Imperial Act 38 and 39 Vict., c. 86.

A threat made to a workman that his fellow workmen will strike, unless he joins a union, or a threat made to a master that the union men in his employ will strike if he continues to employ non-union men, was held not to be intimidation within the meaning of the English Act corresponding with the above Article, 523 ; the ground of the decision apparently being, that, as strikes are now lawful, the mere threat to strike,—which is a lawful act,—cannot amount to intimidation. (1)

It will be seen, by clause (*f*) of the above Article, that picketing is expressly forbidden, as being an act of unlawful intimidation ; and a threat to picket has also been held to be intimidation. (2)

Cave, J., in an unreported case of R. v. McKeevit, Liverpool Assizes, 16 Dec. 1890, ruled that to constitute intimidation within the meaning of section 7 of the English statute, *personal violence* must be threatened. It was not necessary to decide this point in Connor v. Kent, Gibson v. Lawson, and Curran v. Treleaven; but the five judges who decided those cases expressed an opinion that there was much to be said for the view entertained by Cave, J.

The law allows simple watching or attending near a place, for the purpose of obtaining or of communicating information : and, although this was said to be the only exception, (3) the late Recorder of London, in his charge to the jury, at the Central Criminal Court, in the case of R. v. Hibbert, on the 5th of April 1875, went so far as to say, that, if the defendants merely watched the employer's premises for the purpose of informing all comers of the existence of a strike and of *endeavoring to persuade them to join the men on strike*, it would be lawful, so long as it was done peaceably and without anything being done to interfere with

(1) Connor v. Kent, Gibson v. Lawson, Curran v. Treleaven, [1891], 2 Q.B., 545 ; 61 L. J. (M. C.), 9.
(2) Judge v. Bennett, 52, J. P. 247.
(3) R. v. Bauld, 13 Cox 282.

the perfect exercise of free-will on the part of those who were otherwise willing to work on the terms proposed by the employer. The Recorder mentioned, in support of this view, that the law had been previously so laid down by Lush, J., in some cases tried before him. (l)

524. Intimidating persons working at any trade etc.—Every one is guilty of an indictable offence and liable to two years' imprisonment who, in pursuance of any unlawful combination or conspiracy to raise the rate of wages, or of any unlawful combination or conspiracy respecting any trade, business or manufacture, or respecting any person concerned or employed therein, unlawfully assaults any person, or, in pursuance of any such combination or conspiracy, uses any violence or threat of violence to any person, with a view to hinder him from working or being employed at such trade, business or manufacture. R.S.C., c. 173, s. 9.

525. Intimidation of dealers, seamen and others.—Every one is guilty of an indictable offence and liable, on indictment or on summary conviction before two justices of the peace, to a fine not exceeding one hundred dollars, or to three months' imprisonment with or without hard labour, who—

(*a.*) beats or uses any violence or threat of violence to any person with intent to deter or hinder him from buying, selling or otherwise disposing of any wheat or other grain, flour, meal, malt or potatoes or other produce or goods, in any market or other place ; or

(*b.*) beats or uses any such violence or threat to any person having the charge or care of any wheat or other grain, flour, meal, malt or potatoes, while on the way to or from any city, market, town or other place with intent to stop the conveyance of the same ; or

(*c.*) by force or threats of violence, or by any form of intimidation whatsoever, hinders or prevents or attempts to hinder or prevent any seaman, stevedore, ship carpenter, ship labourer or other person employed to work at or on board any ship or vessel; or to do any work connected with the loading or unloading thereof, from working at or exercising any lawful trade, business, calling or occupation in or for which he is so employed ; or with intent so to hinder or prevent, besets or watches such ship, vessel or employee ; or

(*d.*) beats or uses any violence to, or makes any threat of violence against, any such person, with intent to hinder or prevent him from working at or exercising the same, or on account of his having worked at or exercised the same. R.S.C., c. 173, s. 10 ; 50-51 V., c. 94.

526. Intimidating bidders at sales of public lands.— Every person is guilty of an indictable offence and liable to a fine not exceeding four hundred dollars, or to two years' imprisonment, or to both, who, before or at the time of the public sale of any Indian lands, or public lands of Canada, or of any province of Canada, by intimidation,

(l) Arch. Cr. Pl and Ev. 21 Ed. 1013.

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.

527. Conspiring to commit an indictable offence.—Every one is guilty of an indictable offence and liable to seven years' imprisonment, who, in any case not hereinbefore provided for, conspires with any person to commit any indictable offence.

A conspiracy to commit an indictable offence is not triable in a Court of General or Quarter Sessions, unless the indictable offence, which forms the subject-matter of the conspiracy, is so triable. (See Art. 540 *post.*)

For the definition of conspiracy, and for comments on conspiracy, in general, and on conspiracy to defraud, in particular, see remarks under Article 394, at pp. 335-338, *ante.*

As to treasonable conspiracies, they are dealt with by Articles 66 and 69, *ante*; and Article 70, *ante*, deals with conspiracies to intimidate a Legislature.

See, as to conspiracies to bring false accusations, Article 152, as to conspiracies to defile women, Article 188, as to conspiracies to murder, Article 234, as to conspiracies and combinations in restraint of trade, Articles 516 and 520, *ante* and as to unlawful combinations and conspiracies to raise the rate of wages, Article 524 *post.*

For forms of indictments for conspiracy, see pp. 131 and 252, *ante*, and pp. 476, 492 and 493, *post.*

528. Attempts to commit indictable offences.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who attempts, in any case not hereinbefore provided for, to commit any indictable offence for which the punishment is imprisonment for life, or for fourteen years, or for any term longer than fourteen years.

529. Every one who attempts to commit any indictable offence for committing which the longest term to which the offender can be sentenced is less than fourteen years, and no express provision is made by law for the punishment of such attempt, is guilty of an indictable offence and liable to imprisonment for a term equal to one-half of the longest term to which a person committing the indictable offence attempted to be committed may be sentenced.

As to what amounts to an *attempt* to commit a crime, see remarks and authorities under Article 64, at pp. 40-42, *ante.*

See article 711, *post*, as to the right to find an offender guilty of an attempt, upon an indictment charging him with the complete commission of the crime; and, see Article 712, *post*, as to procedure, when, upon a trial for an attempt, the evidence establishes the commission of the full offence. See also Article 713, *post.*

An attempt to commit an indictable offence is not triable at Quarter Sessions, unless the indictable offence itself is so triable. (See Art. 540, *post.*)

530. Attempts to commit certain statutory offences.—Every one is guilty of an indictable offence and liable to one year's imprisonment who attempts to commit any offence under any statute for the time being in force and not inconsistent with this Act, or *incites* or *attempts to incite* any person to commit any such offence, and for the punishment of which no express provision is made by such statute.

A person who incites or advises another to commit a crime, which the other does *not* commit, is guilty of an *attempt* to commit it: (1) but he, who incites another to commit a crime, which the other actually *does* commit, is guilty, as a principal offender, of the crime which he has incited. (2)

531. Accessories after the fact to indictable offences.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who, in any case where no express provision is made by this Act for the punishment of an accessory, is accessory after the fact to any indictable offence for which the punishment is, on a first conviction, imprisonment for life, or for fourteen years, or for any term longer than fourteen years.

532. Every one who is accessory after the fact to any indictable offence for committing which the longest term to which the offender can be sentenced is less than fourteen years, and no express provision is made for the punishment of such accessory, is guilty of an indictable offence and liable to imprisonment for a term equal to one-half of the longest term to which a person committing the indictable offence to which he is accessory may be sentenced.

An accessory after the fact to an indictable offence cannot be tried before a Court of General or Quarter Sessions, unless the indictable offence itself, be one triable before such a court. (See Art. 540.)

For the definition of an accessory after the fact, see Art. 63, and comments thereunder at p. 39, *ante*.

An accessory after the fact may be indicted, as such, whether the principal offender has been indicted and convicted or not; and he may be indicted either alone, as for a substantive offence, or jointly with the principal offender. (See Art. 627, *post*.

Upon an indictment of a person as a principal offender, only, he cannot be convicted of being an accessory after the fact. (3)

Where several persons are tried upon one indictment, some being charged as principals and others as accessories after the fact, and the principal offenders are, in accordance with article 713, found guilty, not of the offence actually charged, but of some other offence included therein,—as where the principals are charged with murder and found guilty of manslaughter only,—the persons so charged as accessories may be convicted as accessories to the offence of which the principals are so found guilty. (4)

The accused must be proved to have done some act to assist the principal offender in relation to the crime which he has committed. (5)

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(1) R. v. Gregory, L. R., 1 C. C. 77; 10 Cox 459; and see comments under Articles 62 and 64, at pp. 38-40, *ante*.
(2) See Arts. 61 & 62, *ante*, pp. 35, 36.
(3) R. v. Fallon, L. & C. 217; 32 L. J. (M. C.) 66.
(4) R. v. Richards, 2 Q. B. D. 311; 46 L. J. (M. C.), 200.
(5) R. v. Chapple, 9 C. & P. 355.

But if a person employ another to harbor or relieve the principal offender, he will be equally guilty, as an accessory after the fact, as if he did the harboring and relieving personally. (1)

The accused must be proved to have known of the commission of the principal offence by the principal offender. This knowledge may be proved by the accused's own admissions, or it may be proved by evidence of circumstances from which the jury may fairly presume it. (2)

(1) R. v. Jarvis, 2 M. & R. 40.
(2) R. v. Beveridge, 3 P. Wms. 439.

FORMS OF INDICTMENT UNDER TITLE VI.

HEADING OF INDICTMENT. (1)

In the (*name of the Court in which the indictment is found.*)

The Jurors for our Lady the Queen present that (*Where there are more counts than one, add at the beginning of each count*) :

" The said Jurors further present that

STATEMENTS OF OFFENCES.

THEFT OF THINGS UNDER SEIZURE.

At on , A., without lawful authority, did unlawfully take and carry away, one horse of the value of belonging to the said A., (*or*, " one B."), and then and there being under lawful seizure.

OR.

At on , A., stole one horse of the value of then under lawful seizure.

KILLING AN ANIMAL, WITH INTENT TO STEAL THE CARCASE, ETC.

At on , A., unlawfully did kill one sheep, belonging to B., with intent to steal the carcase (*or* " a part of the carcase, to wit, the inward fat ") of the said sheep.

FRAUDULENT CONVERSION BY A PERSON ENTRUSTED WITH MONEY.

At on , A., — having theretofore received from B., the sum of one hundred dollars, on terms requiring him, the said A., to pay over the same to C., - did fraudulently convert to his own use and thereby steal the said sum of money.

THEFT BY HOLDER OF A POWER OF ATTORNEY.

At on , A., having been theretofore entrusted, by B., with a power of attorney for the sale of a certain lot of

(1) See, as to requisites of indictment, Article 608, *et* seq.

land and the buildings thereon, to wit, (*Describe the property*), and having theretofore sold the said land and buildings, did, then and there, fraudulently convert the proceeds of the said sale, to wit, the sum of two thousand dollars, to a purpose other than that for which he was entrusted with the said power of attorney, by then and there applying and converting the said money to his own use.

THEFT BY MISAPPROPRIATING MONEY HELD UNDER DIRECTION.

At on , A., having theretofore received from B., the sum of one hundred dollars, with a direction from him the said B., to the said A., that the said money should be paid to C., did, then and there, in violation of good faith and contrary to the terms of the said direction, fraudulently and unlawfully convert to his own use and thereby steal the said sum of money.

THEFT BY A PARTNER.

At on , A stole one car load of coals of the value of the property of a co-partnership composed of the said A. and one B.

RECEIVING PROPERTY STOLEN, OR OBTAINED BY ANY INDICTABLE OFFENCE.

At on , A did unlawfully receive and have one piano, belonging to B., and theretofore unlawfully stolen (*or* "obtained by an indictable offence, to wit, by false pretences," *or* [*describe the offence by which the piano was obtained*]), he the said A., then well knowing the said piano to have been so unlawfully stolen, (*or* "obtained by the said indictable offence.")

OR.

At on , A. unlawfully stole one piano belonging to B *And the jurors aforesaid do further present*, that, afterwards, at on , C, the said piano so stolen as aforesaid, unlawfully did receive and have, he, the said C., then well knowing the said piano to have been stolen.

THEFT BY A CLERK OR SERVANT.

At on A., being then and there a clerk, [*or* "employed for the purpose and in the capacity of a clerk"] to B., his master, (*or* "employer"), did unlawfully steal certain money, to the amount of one hundred dollars, certain goods, to wit, one gold watch and one gold chain, and a certain valuable security, to wit, one promissory note for the payment of twenty dollars, of and belonging to (*or* "in the possession of") the said B., his master, (*or* "employer.")

THEFT BY A BANK OFFICIAL.

At, on A., being then and there a cashier (*or* "assistant cashier," *or* "manager" *or* "clerk" etc.,) of the Bank, (*or* "Savings Bank"), did unlawfully steal certain money to the amount of five thousand dollars, (*or* "bonds," or "obligations," etc., [*Describe them*],) of and belonging to, (*or* "lodged," *or* "deposited") in the said Bank, (*or* "Savings Bank.").

THEFT BY GOVERNMENT EMPLOYEE.

At on A., being then and there employed in the service of Her Majesty, (*or* "the Government of Canada", *or*

" the Government of the Province of Ontario," *or* " Quebec " *or* " the Municipality of "), *and being; then* and there, by virtue of his said employment, in possession of certain moneys to the amount of ten thousand dollars, (*or* " certain valuable securities, to wit," [*Describe them*]), did unlawfully steal the said monoys, (*or* " the said valuable securities.").

GOVERNMENT EMPLOYEES REFUSING TO DELIVER UP BOOKS, ETC.

At on A , being then and there employed in the service of Her Majesty, (*or* " the Government of Canada " *or* " the Government of the Province of Ontario," *or* " Quebec ", *or* " the Municipality of "), *and being, then* and there, entrusted, by virtue of his employment, with the keeping (*or* " receipt ", *or* " custody ", *or* " management ", *or* " control ") of certain monies, to the amount of ten thousand dollars, (*or* " certain chattels, to wit," [*Describe them*], *or* " certain valuable securities, to wit," [*Describe them*], *or* " certain books, papers, accounts, and documents, to wit," [*Describe them*],), did unlawfully refuse (*or* " fail ") to deliver up the same, to B., who was, then and there, duly authorized to demand them.

THEFT BY TENANT.

At on A., being then and there a tenant, (*or* " lodger ") of or in a certain house (*or* " lodging,"), to wit, (*Describe the premises*), did unlawfully steal a certain chattel, (*or* " fixture "), to wit, (*Describe the chattel or fixture*). belonging to B., and let to be used by him the said A., in or with the said house, (*or* " lodging ")

THEFT OF A WILL.

At on A., did unlawfully steal a certain testamentary instrument, to wit, the last will and testament (*or* " a codicil to the last will and testament ") of B.

THEFT OF A DOCUMENT OF TITLE.

At on , A., unlawfully, did steal a certain document of title to goods, to wit, one bill of lading, [*Describe the document and the goods to which it relates*], (*or* " one dock warrant," *or* " warehouse keeper's receipt," etc), the property of B.

OR.

At on , A., unlawfully did steal, a certain document of title to lands, to wit, one deed, (*or* " map," *or* " paper " etc.), containing evidence of the title, (*or* " a part of the title ") of B., to certain real property, to wit, [*Describe the property*], belonging to the said B. (*or* " in which the said B. has an interest.")

THEFT OF JUDICIAL DOCUMENTS, ETC.

At on , A., unlawfully did steal, a certain record of and belonging to the Superior Court of Lower Canada for the District of Montreal in a certain cause [*Describe the cause, matter or proceeding*] then (*or* " theretofore "), depending in the said Court.

OR.

At on , A., unlawfully did steal, a certain writ, (*or* " petition," etc.), forming part of a certain record of and belonging to the Superior Court of Lower Canada, for the District of Montreal, in a certain cause [*Describe the cause, matter, or proceeding*], then (*or* " theretofore ") depending in the said Court.

STEALING A POST-LETTER BAG. (1)

At on , A., unlawfully did steal, one post-letter bag, the property of the Post-master General.

STEALING A POST-LETTER FROM A POST-LETTER BAG, ETC.

At on , A., unlawfully did steal, one post-letter, the property of the Post-master General, from a post-letter bag, (*or* "from a post-office" *or* "from an officer employed in the post-office of Canada.")

STEALING A POST-LETTER WITH MONEY IN IT.

At on , A., unlawfully did steal, one post-letter, the property of the Post-master General which post-letter contained a certain chattel, to wit, [*Describe it*] (*or* "certain money to the amount of " *or* "a certain valuable security, (2) to wit," [*Describe it*]).

STEALING MONEY, ETC., OUT OF A POST-LETTER.

At on , A , unlawfully did steal, a certain chattel, to wit, [*Describe it*], (*or* "certain money to the amount of " *or* "a certain valuable security, to wit," [*Describe it*]) from and out of a post-letter, the property of the Post-master General.

STEALING A POST LETTER ETC. (Art. 327.)

At on , A, unlawfully did steal one post-letter, the property of the Post-master General.

OR.

At on , A, unlawfully did steal one parcel, the property of the Post master General, which parcel was then and there being sent by parcel post.

OR.

At on , A, unlawfully did steal a certain article, to wit, [*describe it*], contained in a parcel, the property of the Post master General, which parcel was then and there being sent by parcel post.

STEALING CATTLE.

At on , A, unlawfully did steal one horse the property of B.

STEALING OYSTERS.

At on , A., unlawfully did steal from a certain oyster-bed, called , the property of B., one hundred oysters

DREDGING FOR OYSTERS.

At on , A ; within the limits of a certain oyster-bed, called , the property of B., and sufficiently marked out and known as the property of the said B., unlawfully and wilfully did use a certain dredge (*or* "net," *or* "instrument," *or* "engine,") for the purpose of then and there taking oysters, (*or* "oyster-brood.")

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(1) For meaning of "post-letter bag," etc., see Art. 4, p. 7, *ante*.
(2) For meaning of "valuable security," see Art. 3 (*cc*), p. 6, *ante*.

DRAGGING ON THE GROUND OF AN OYSTER FISHERY.

At on , A, unlawfully and wilfully did drag, with a certain net, (*or* "instrument," *or* "engine,") upon the ground of a certain oyster fishery called , the property of B., and sufficiently marked out and known as the property of the said B.

STEALING THINGS FIXED TO BUILDINGS.

At on , A. unlawfully did steal sixty pounds weight of lead, the property of B., then being fixed in a certain dwelling-house belonging to the said B., and situated in aforesaid.

STEALING TREES WORTH MORE THAN $25.

At on , A, unlawfully did steal one ash tree of the value of twenty six dollars, the property of B., then growing in a certain field belonging to the said B., and situated in , aforesaid.

STEALING A TREE, (WORTH $5), IN A PARK, ETC.

At on , A, unlawfully did steal one apple tree, of the value of six dollars, the property of B., growing in a certain orchard of the said B, situated at aforesaid.

STEALING TREES AFTER TWO PREVIOUS CONVICTIONS. (1)

At on A., unlawfully, did steal one shrub of the value of fifty cents, the property of B., then growing in a certain plot of land situate and being in aforesaid ; and the said jurors say, that heretofore, to wit, at on , (before the committing of the hereinbefore mentioned offence), the said A. was duly, convicted, before C., one of Her Majesty's Justices of the Peace for the District of of having at on [*Set out the offence forming the basis of the first conviction*] and was adjudged, for his said offence, to pay, [etc.], and, in default of payment, [etc.], to be imprisoned, [etc.] : And the said jurors further say that heretofore, to wit, at on , (before the committing of the firstly hereinbefore mentioned offence, but after the next hereinbefore mentioned conviction), the said A. was again duly convicted before D., one of Her Majesty's Justices of the Peace for the District of , of having at on [*Set out the second conviction*]: And so the jurors aforesaid say that, on the day and year first aforesaid the said A., did unlawfully steal the said shrub of the value of fifty cents, after having been twice convicted of the offence of stealing a shrub, (*or* "tree" [etc.], of the value of at least twenty five cents.

STEALING FRUIT, ETC., GROWING IN A GARDEN, ETC. AFTER A PREVIOUS CONVICTION. (1)

At on A., unlawfully did steal, forty pounds weight of pears the property of B., then growing in a certain orchard of the said B., situated in aforesaid ; And the said jurors say that, heretofore, to wit, at on (before the committing of the hereinbefore mentioned offence), the said A.

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(1) See comments and authorities under Art. 478, *ante*, p. 432, as to second offences. And see, also, Articles 628 and 676, *post*.

was duly convicted before C., one of Her Majesty's Justices of the Peace for the district of of having at on , [*Set out the offence forming the basis of the first conviction*], and was adjudged, for his said offence, to pay [etc.], and in default of payment [etc.,] to be imprisoned [etc.] : And so the jurors aforesaid say that, on the day and year first aforesaid, A. did unlawfully steal the said forty pounds weight of pears, after having been previously convicted of the offence of stealing fruit in an orchard (*or* " garden " [etc.]).

STEALING METAL ORE, ETC., FROM A MINE.

At on , A., unlawfully did steal five tons weight of iron ore, (*or* "coal"), the property of B., from a certain iron (*or* " coal") mine of the said B., situated in aforesaid.

STEALING FROM THE PERSON.

At on , A., unlawfully did steal one gold watch, and one silver watch-chain from the person of B.

STEALING IN A DWELLING-HOUSE.

At on , A., unlawfully did steal twelve silver spoons, and twelve silver forks of the total value of twenty five dollars, of the goods and chattels of B., in the dwelling-house of the said B., situated in aforesaid.

OR.

At on , A., unlawfully did steal twelve silver forks of the goods and chattels of B., in the dwelling-house of the said B. situated in aforesaid ; there being, then and there in the said dwelling-house, one C, who was then and there put in bodily fear by the menaces and threats of the said A.

STEALING BY PICKLOCKS.

At on , A., unlawfully, by means of a picklock, (*or* " false key " etc., did steal the sum of twenty-five dollars, the property of B., from a locked and secured receptacle for property.

STEALING GOODS IN MANUFACTORIES.

At on , A , unlawfully did steal forty yards of calico of the value of five dollars, belonging to B., in a certain weaving shed of the said B , situated in aforesaid, whilst the same was exposed upon the looms of the said B , in the said weaving shed, during a certain stage, process or progress of the manufacture thereof.

FRAUDULENTLY DISPOSING OF GOODS ENTRUSTED FOR MANUFACTURE.

At on , A., did fraudulently dispose of a certain quantity, to wit, one hundred yards, of tweed cloth, the property of B., which the said A. had been theretofore entrusted with for the purpose of manufacture.

STEALING IN A SHIP ON A NAVIGABLE RIVER.

At on , A., unlawfully did steal, in a certain ship called the "Nepigon " twelve bars of iron of the goods and merchandise of B., then being in the said ship, upon the navigable river St. Lawrence, (*or* " in a certain port of discharge, to wit, the port of Montreal.")

STEALING FROM A DOCK.

At on , A, unlawfully *did* steal *from a certain* dock, (*or* "wharf") adjacent to *the navigable* river St. Lawrence, one sack of flour of the goods and merchandise of B., then *being* upon the said dock.

STEALING WRECK. (1)

At on , A, unlawfully *did* steal one coil of rope, and one compass, *being portions* of the tackle of a certain ship, called the "*Hawk*," the *property* of B., and other persons to the jurors unknown, which ship was then and there lying stranded and wrecked.

OR.

At on , A, unlawfully *did* steal one bale of raw silk of the goods and merchandise of and belonging to B., and forming part of the cargo of a certain ship called the "*Pomeranian*," which was then and there lying stranded and wrecked.

OR.

At on , A, unlawfully *did* steal a gold watch, the property of B., a ship wrecked person (2) belonging to a certain ship called the "*Highflyer*," which then and there lay stranded and wrecked.

STEALING IN OR FROM RAILWAY STATIONS, ETC.

At on , A, unlawfully did steal one umbrella and one rug of the goods and chattels of B., in (*or* "from,") a certain railway station, to wit, a station belonging to the Grand Trunk Railway Company (*or* "the Canadian Pacific Railway Company,") and situated at aforesaid.

DESTROYING DOCUMENT OF TITLE TO GOODS.

At on , A, unlawfully, and for a fraudulent purpose, did destroy, (*or* "cancel," *or* "conceal," *or* "obliterate" a certain document of title to goods, to wit, one bill of lading, [*Describe it.*]

FRAUDULENT CONCEALMENT, ETC.

At on , A, unlawfully and for a fraudulent purpose, did take (*or* "obtain," *or* "remove," *or* "conceal,") one horse and one express wagon, the property of B, of the value of one hundred dollars.

BRINGING STOLEN PROPERTY INTO CANADA.

On at , A., unlawfully did bring into Canada, to wit, into the City of Montreal, in the province of Quebec, twelve gold watches and five diamond rings, of the total value of two thousand dollars, theretofore stolen by him the said A., outside of Canada, to wit, in the City of New York in the State of New York, one of the United States of America.

HAVING IN CANADA PROPERTY STOLEN ELSEWHERE.

At on , A., unlawfully did have in his possession in Canada to wit, at aforesaid twelve gold watches and five diamond rings of the total value of two thousand dollars, theretofore stolen by him the said A, outside of Canada, to wit, in the City of New York in the State of New York, one of the United States of America.

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(1) For definition of "*Wreck*," see Art. 3 (*dd*), *ante*.
(2) For definition of "*Shipwrecked Person*," see Art. 3 (*x*), *ante*.

OBTAINING BY FALSE PRETENCES.

At on , A., unlawfully, and by false pretences, did obtain from B., five barrels of flour of the value of with intent to defraud.

OBTAINING EXECUTION OF VALUABLE SECURITY BY FALSE PRETENCES.

At on , A., unlawfully, and by false pretences, did cause and induce B., to execute (*or* "make" *or* "accept," *or* "endorse" *or* "destroy") a certain valuable security, to wit, a promissory note for one hundred dollars with intent thereby then and there to defraud and injure the said B.

OBTAINING PASSAGE BY FALSE TICKET.

At on , A., fraudulently unlawfully, and by means of a false ticket, (*or* "order"), did obtain (*or* "attempt to obtain") a passage on a carriage or car of the Montreal Street Railway Company

CRIMINAL BREACH OF TRUST.

At on , A., then being,—under and by virtue of the Will of B.,—a trustee (1) of certain property, to wit, [*Describe it*], for the use and benefit of C., D., E. and F., did, unlawfully, and in violation of his trust, convert the same to a use not authorized by the said trust, with intent to defraud.

FRAUD BY OFFICIAL.

At on , A, then being a director (*or* "manager," [*etc.*]) of a certain body corporate called , did unlawfully destroy (*or* "alter," *or* "mutilate," *or* "falsify,") a certain book (*or* "paper," *or* "writing," *or* "valuable security") to wit, [*describe the book*, etc.], belonging to the said body corporate, with intent to defraud.

OR.

At on A., then being a director [etc.], of a certain body corporate called did unlawfully, and with intent to defraud make (*or* "concur in making") in a certain book of account to wit, [*describe it*] of the said body corporate, a certain false entry, by then and there falsely entering in such book [*describe the false entry.*]

OR

At on , A, then being a director [etc.] of a certain body corporate called did, unlawfully, and with intent to defraud, omit (*or* "concur in omitting") certain material particulars from a certain book of account of the said body corporate, by then and there omitting from such book [*describe the omission*].

FALSE STATEMENT BY A PROMOTER, DIRECTOR, PUBLIC OFFICER OR MANAGER OF A PUBLIC COMPANY.

At on , A., being then a promoter, (*or* "director," *or* "public officer," *or* "manager") of a certain body corporate (*or* "public company") then intended to be formed and to be called , (*or* "then actually existing and called ") did, unlawfully, make, circulate, and publish (*or* "concur in making, circulating, and publishing a certain prospectus (*or* "account" *or* "statement,") well knowing the same to be false in certain material particulars, to wit [*State*

(1) For definition of "Trustee," see Art. 3 (*bb*), *ante*, p. 6.

them], with intent to induce certain persons to the jurors aforesaid unknown, to become shareholders or partners (*or* "with intent to deceive and defraud the members shareholders and creditors,") of the said body corporate (*or* "public company.")

FALSE ACCOUNTING BY CLERK.

At on , A., then being a clerk in the employ of B., did, unlawfully, with intent to defraud, destroy (*or* "alter," *or* "mutilate," *or* "falsify") a certain book (*or* "paper," *or* "writing," *or* "valuable security,") to wit, [*describe the book*, etc.], belonging to (*or* "in the possession of," *or* "received by the said A., for and on behalf of") the said B.

OR,

At on A., then being a clerk in the employ of B., did unlawfully and with intent to defraud, make (*or* "concur in making") in a certain book (*or* "paper," *or* "writing," *or* "valuable security"), to wit, [*Describe the book*, etc] belonging to (*or* "in the possession of," *or* received by the said A. for and on behalf of") the said B., a certain false entry, by then and there falsely entering in such book (*or* "paper" *or* "writing," *or* "valuable security"), [*Describe the false entry.*]

FRAUDULENT ASSIGNMENT BY A DEBTOR.

At on A., unlawfully and with intent to defraud his creditors did make (*or* "cause to be made") a gift, (*or* "conveyance," *or* "assignment," *or* "sale," *or* "transfer," *or* "delivery"), of his property, to B.

OR,

At on A., unlawfully did remove, (*or* "conceal," *or* "dispose of") his property, with intent to defraud his creditors.

FRAUDULENTLY RECEIVING A DEBTOR'S PROPERTY.

At on A., unlawfully, and with intent that B. should defraud his creditors, did receive, the property of the said B., then and there given, (*or* "conveyed," *or* "assigned," *or* "sold," *or* "transferred," *or* "delivered," *or* "removed," *or* "concealed," *or* "disposed of") by the said B., with intent to defraud his creditors.

GIVING A FALSE WAREHOUSE RECEIPT.

At on A., then being the keeper of a warehouse, [etc.], for storing timber [etc.], unlawfully, knowingly, wilfully and with intent to mislead (*or* "injure," *or* defraud,") did give to B. a certain writing purporting to be a receipt for, (*or* "acknowledgement of"), certain goods, to wit, [*Describe them*], as having been received into his the said A's warehouse [etc.], before the said goods had been received by him the said A., as aforesaid.

FALSE RECEIPT FOR GRAIN, ETC.

At on , A., in a certain receipt (*or* "certificate," *or* "acknowledgment"), for grain (*or* "timber," etc.) to be used for one of the purposes of *The Bank Act*. to wit, for the purpose, [*Mention the purpose*], unlawfully and wilfully did make a false statement, to wit, [*Set out the statement and shew in what respect it was false.*]

UNLAWFULLY APPLYING MARKS TO PUBLIC STORES

At on . A., unlawfully and without lawful authority, did apply, in and on certain stores, to wit, fifty yards

of canvas, and twenty yards of fearnought, a certain mark, to wit, a blue line in a serpentine form.

OR.

At on , A., unlawfully and without lawful authority, did apply in and on certain stores, to wit, fifty yards of bunting, a certain mark, to wit, a double tape in the warp of the said bunting.

UNLAWFUL POSSESSION, ETC., OF PUBLIC STORES.

At on , A., unlawfully, and without lawful authority did receive (*or* "possess," *or* "keep," *or* "sell," *or* "deliver") certain public stores, to wit, twenty five pounds of candles, bearing a certain mark, to wit, blue threads in each wick, to denote Her Majesty's property therein.

RECEIVING REGIMENTAL NECESSARIES.

At on , A. unlawfully did buy from a certain soldier to wit, B., certain arms (*or* "clothing") to wit, [*Describe them*] belonging to Her Majesty.

CONSPIRACY TO DEFRAUD. (1)

At on , A., B., and C., did, unlawfully, conspire together to defraud the public, (*or* "D",) by deceit, (*or* "falsehood," *or* "by the fraudulent means following to wit, [*Set out the fraudulent means agreed upon*]).

CHEATING AT PLAY, ETC.

At on , A., unlawfully, and with intent to defraud B. did cheat in playing at a game with cards (*or* "dice.")

ROBBERY, WITH WOUNDING, ETC.

At on , A., with and by means of violence (*or* "threats of violence") then and there used by him to and against the person (*or* "property") of B., to prevent (*or* "overcome") resistance, did unlawfully and violently steal from the person (*or* "in the presence") of the said B., and against the said B's will, one gold watch and one gold chain, of the goods and chattels of the said B.; and that at the time (*or* "immediately before," *or* "immediately after") he so robbed the said B., as aforesaid, he the said A. did unlawfully wound (*or* "beat," *or* "strike," *or* "use personal violence to") the said B.

ROBBERY BY A PERSON ACCOMPANIED BY OTHERS.

At on A., then being together with other persons to the jurors aforesaid unknown, did with and by means of violence, (*or* "threats of violence") then and there used by him to and against the person (*or* "property") of B., to prevent (*or* "overcome") resistance, unlawfully and violently steal from the person (*or* "in the presence") of the said B., and against the said B's will, moneys of the said B., to the amount of one hundred dollars.

ASSAULT, WITH INTENT TO ROB, BY A PERSON ACCOMPANIED BY OTHERS.

At on , A., then being together with other persons to the jurors aforesaid unknown, did, in and upon B., unlaw-

(1) For Form of Indictment for conspiracy to defile a woman, see p. 131, *ante* for form of indictment for conspiracy to murder, see p. 252, *ante*, and for other forms of Indictment for conspiracy, see pp. 492 and 493, *post*.

fully make an assault with intent, the moneys goods and chattels of the said B., then and there unlawfully and violently, to steal, from the person, and against the will of the said B.

ROBBERY BY SEVERAL PERSONS TOGETHER.

At on , A., B., and C., being then and there together, did, with and by means of violence (*or* "threats of violence") used by them to and against the person (*or* "property") of B., to prevent (*or* "overcome" resistance, unlawfully and violently steal from the person (*or* "in the presence") of the said B., and against the said B's will, moneys of the said B., amounting to one hundred dollars.

ROBBERY BY A PERSON ARMED WITH AN OFFENSIVE WEAPON.

At on , A., then being armed with a certain offensive weapon, to wit, a brass knuckle-duster (*or* "lead-loaded cane," *or* "sand-bag" *or* "pistol," *or* "knife"), did, with and by means of violence, (*or* "threats of violence"), then and there used by him to and against the person (*or* "property") of B., to prevent (*or* "overcome") resistance, unlawfully and violently steal from the person (*or* "in the presence") of the said B., and against the said B's will, one diamond ring of the goods and chattels of the said B.

ASSAULT BY AN ARMED PERSON, WITH INTENT TO ROB.

At on , A., then being armed with a certain offensive weapon to wit, a heavy bludgeon, did, in and upon B., unlawfully make an assault, with intent the moneys, goods and chattels of the said B., then and there unlawfully and violently to steal from the person and against the will of the said B.

ROBBERY.

At on , A., with and by means of violence (*or* "threats of violence") then and there used by him to and against the person (*or* "property") of B., to prevent (*or* "overcome") resistance, did unlawfully and violently steal from the person (*or* "in the presence,") of the said B., and against the said B's will, moneys of him the said B., amounting to fifty dollars.

ASSAULT WITH INTENT TO ROB.

At on , A., in and upon B. unlawfully did make an assault, with intent the moneys, goods, and chattels of the said B., then and there, unlawfully and violently to steal from the person and against the will of the said B.

STOPPING THE MAIL. (1)

At on , A., unlawfully did stop a certain mail, to wit, the mail for the conveyance of letters between and with intent to rob (*or* "search") the same.

COMPELLING EXECUTION OF A DOCUMENT BY FORCE.

At on , A., by means of unlawful violence to (*or* "restraint of") the person of B., did unlawfully compel the said B., to execute (*or* "sign" *or* "destroy") a certain deed, to wit, [*Describe it*], with intent to defraud, (*or* "injure").

OR.

At on , A., by means of a threat that he would employ unlawful violence to (*or* "restraint of") the person

(1) For the definition of "Mail" see Article 4, *ante*, p. 7.

of B., did unlawfully compel the said B. to sign (*or* "accept," *or* "endorse, *or* "destroy," *or* "alter") a certain promissory note (*or* "bill of exchange") to wit, [*Describe it*], with intent to defraud (*or* "injure").

SENDING THREATENING LETTER.

At on , A., did unlawfully send to (*or* "cause to be received by") B. a certain letter (*or* "writing") demanding of the said B., with menaces, a certain sum of money, to wit, one thousand dollars, the said demand being without reasonable or probable cause, and he the said A. then well knowing the contents of the said letter (*or* "writing"), which is as follows: [*Set out the letter.*]

DEMANDING WITH INTENT TO STEAL.

At on , A., with menaces, unlawfully did demand of B., a certain sum of money, to wit, One hundred dollars, with intent then and there to steal the same from the said B.

EXTORTION BY THREATS TO ACCUSE OF CERTAIN SERIOUS CRIMES.

At on A., unlawfully did accuse (*or* "threaten to accuse") B. of having committed an offence punishable by law with death (*or* "imprisonment for seven years or more") to wit, murder, (or "forgery," *or* "burglary," *or* "bigamy," [etc.]), with intent thereby then and there to extort and gain money from the said B.

OR,

At on A., unlawfully did accuse (*or* "threaten to accuse") B. of having committed an assault with intent to commit a rape, (*or* "attempted or endeavored to commit a rape"), with intent thereby then and there to extort and gain money from the said B.

OR,

At on A., unlawfully, did accuse (*or* "threaten to accuse") B. of having committed an infamous offence, to wit, the abominable crime of buggery, with intent thereby then and there to extort and gain money from the said B.

OR,

At on A., with intent to extort and gain money from B., unlawfully did cause the said B., to receive a certain document accusing (*or* "threatening to accuse") the said B., of having counselled and procured one C., to commit an infamous offence, to wit, the abominable crime of buggery, he the said A. then well knowing the contents of the said document, which is as follows: [*Set out the document.*]

EXTORTION BY THREATS TO ACCUSE OF OTHER CRIMES.

At on , A., unlawfully did accuse (*or* "threaten to accuse") B., of having committed the offence of polygamy (*or* "libel" *or* "aggravated assault" *or* "gaming in stocks," *or* "frequenting bucket shops," *or* "corrupting jurors," *or* "obtaining money by false pretences," *or* "defrauding creditors" [etc.]), with intent, thereby, then and there to extort and gain money from the said B.

BREAKING A PLACE OF PUBLIC WORSHIP.

At on , A., unlawfully did break and enter a certain place of public worship, to wit, [*describe the church, chapel, or other place of public worship*], and there, in the said church, (*or* "chapel," [etc.]), did unlawfuliy steal, one silver candlestick of the goods and chattels of

STEALING IN AND BREAKING OUT OF A PLACE OF PUBLIC WORSHIP.

At on , A., then being in a certain place of public worship, to wit, [*Describe the* church, chapel, (etc.)], unlawfully did steal therein one silver candle stick, of the goods and chattels of , and that after committing the said theft, in the said church (etc.), he the said A., did then and there unlawfully break out of the said church (etc.).

BREAKING PLACE OF PUBLIC WORSHIP WITH INTENT TO COMMIT AN INDICTABLE OFFENCE THEREIN.

At on , A., unlawfully did break and enter a certain place of public worship to wit. [*Describe the church, chapel, or other place of worship*] with intent, then and there, unlawfully to steal the goods and chattels of in the said church (etc.) (*or* "with intent then and there to commit, in the said church, (*etc.*), an indictable offence to wit," [*Describe the offence*]).

BURGLARY.

At on , about the hour of twelve at night, A., unlawfully and burglariously did break and enter the dwelling-house of B., there situated, with intent unlawfully and burglariously to steal the goods and chattels of the said B., then and there being found in the said dwelling-house, (*or* "with intent to commit, in the said dwelling-house, an indictable offence, to wit," [*Describe the offence*]).

OR,

At on , about the hour of twelve at night, A., unlawfully and burglariously did break and enter the dwelling-house of B., there situated, with intent unlawfully and burglariously to steal the goods and chattels of the said B, then and there being found in the said dwelling-house; and he the said A., having so broken and entered and then being in the said dwelling-house did unlawfully and burglariously steal twelve silver forks and twelve silver spoons of the value of forty dollars, of the goods and chattels of the said B., in the said dwelling-house then being found.

OR,

At on A., then being in the dwelling-house of B., unlawfully did steal twelve silver forks and twelve silver spoons of the value of forty dollars of the goods and chattels of the said B. in the said dwelling-house, and the said A, being so as aforesaid in the said dwelling-house and having committed the theft aforesaid, did afterwards, to wit, on the day and year aforesaid, about the hour of twelve at night, unlawfully and burglariously break out of the said dwelling-house.

HOUSE BREAKING.

At on , A, unlawfully did break and enter by day the dwelling-house of B, there situated, and, twelve silver forks of the value of twenty dollars, the property of the said B., then and there being found therein, did then and there unlawfully steal.

OR.

At on , A, unlawfully did break and enter, by day, the dwelling-house of B., there situated, with intent to commit an indictable offence therein, to wit, to steal the goods then and there being in the said dwelling-house.

BREAKING SHOP, ETC.

At on , A, unlawfully, did break and enter the shop of B., there situated, and five boxes of cigars of the value of twenty dollars, the property of the said B., then and there being found therein, did, then and there, unlawfully steal.

OR.

At on , A., unlawfully did break and enter a certain building, there situated, and being within the curtilage of and occupied with the dwelling-house of B., but not connected with or forming part of the said dwelling-house either immediately or by means of any covered or enclosed passage, and one horse of the value of seventy five dollars the property of the said B., then and there being found in the said building, did then and there unlawfully steal.

OR.

At on , A, unlawfully did break and enter the shop of B., there situated, with intent to commit an indictable offence therein, to wit, to steal the goods and chattels of the said B., then and there being in the said shop.

OR.

At on , A, unlawfully did break and enter a certain building there situated and being within the curtilage of and occupied with the dwelling.house of B., but not connected with or forming part of the said dwelling-house either immediately or by means of any covered or enclosed passage, with intent then and there the goods and chattels of the said B., then being in the said building, unlawfully to steal

BEING FOUND IN A DWELLING-HOUSE BY NIGHT.

At on about the hour of twelve at night A. unlawfully did enter (*or* " was in ") the dwelling-house of B., there situated, with intent the goods and chattels of the said B. unlawfully to steal.

BEING FOUND ARMED WITH INTENT TO BREAK AND ENTER.

At on A., was found, by day, unlawfully armed with a certain dangerous and offensive weapon (*or* " instrument ") to wit, [*Describe it*] with intent to break and enter the dwelling-house of B. there situated, and to commit therein an indictable offence to wit, unlawfully to steal the goods and chattels of the said B. then being in the said dwelling-house.

OR,

At on A., was found, by night, unlawfully armed with a certain dangerous and offensive weapon (*or* " instrument ") to wit [*Describe it.*] with intent to break and enter a certain building of B. there situated, and to commit therein an indictable offence, to wit, unlawfully to steal the goods and chattels of the said B. then being in the said building.

HAVING POSSESSION, BY NIGHT, OF HOUSE-BREAKING INSTRUMENTS.

At on , A., was found, about the hour of twelve at night, unlawfully and without lawful excuse, in possession of certain house-breaking instruments, to wit, [*Describe them*].

HAVING POSSESSION, BY DAY, OF HOUSE-BREAKING INSTRUMENTS, WITH INTENT.

At on . A., was found, by day, unlawfully and without lawful excuse, in possession of certain house-breaking

instruments to wit, [*Describe them*] with intent then and there to commit an indictable offence, to wit, [*Mention the offence*].

BEING FOUND DISGUISED BY NIGHT.

At on , A., was found, by night, unlawfully and without lawful excuse, with his face masked (*or* "blackened").

BEING FOUND DISGUISED, BY DAY, WITH INTENT.

At on , A., was found, by day unlawfully and without lawful excuse, in a certain disguise, to wit, [*Describe the disguise*] with intent then and there to commit an indictable offence, to wit, [*Mention the offence*].

FORGERY.

At on A., unlawfully and knowingly did forge a certain document, to wit, [*Describe the document by its usual name*, or, *set forth a copy of it.*].

UTTERING A FORGERY.

At on A., knowing a certain document, to wit, [*Describe it*] to be forged, did unlawfully utter (*or* "use" *or* "deal with," *or* "act upon," *or* "attempt to use," etc.), the said forged document, as if it were genuine.

COUNTERFEITING SEALS.

At on A., unlawfully did make and counterfeit a certain public seal, to wit, the public seal of the Dominion of Canada.

UTTERING COUNTERFEIT SEALS.

At on A., knowing a certain seal, to wit, a seal purporting to be the public seal of the Dominion of Canada, to be counterfeited, did unlawfully use the said counterfeited seal.

UNLAWFULLY PRINTING PROCLAMATION.

At on , A, unlawfully did print a certain proclamation, to wit, [*Describe it*] and did then and there unlawfully cause the same to falsely purport to have been printed by the Queen's Printer for Canada.

SENDING A FALSE TELEGRAM.

At on , A, unlawfully, and with intent to defraud, did cause and procure a certain telegram in the words and figures following, [*Set out the telegram*] to be sent, (*or* "delivered,") to B., as being sent by the authority of C., knowing that it was not sent by such authority, with intent that the said telegram should be acted on as being sent by the said C.

SENDING FALSE TELEGRAMS, OR LETTERS, WITH INTENT TO INJURE OR ALARM.

At on , A, unlawfully and with intent to injure (*or* "alarm") B., did send (*or* "cause" *or* "procure to be sent") to the said B, a certain telegram (*or* "letter,") containing matter which he the said A., knew to be false, to wit, a telegram (*or* "letter,") in the words and figures following [*Set out the telegram or letter*].

COUNTERFEITING REVENUE STAMPS. (1)

At on , A., unlawfully and fraudulently did counterfeit a certain revenue stamp, to wit, [*Describe it*].

SELLING COUNTERFEITED REVENUE STAMPS.

At on , A., unlawfully and knowingly, did sell (*or* "expose for sale" *or* "utter" *or* "use") a certain counterfeited revenue stamp, to wit, [*Describe it*].

FALSIFYING REGISTERS.

At on , A., unlawfully, did destroy (*or* "deface" *or* "injure") a certain register then and there lawfully kept as the register of births (*or* "baptisms," *or* "marriages," *or* "deaths," *or* "burials") of the parish of

OR,

At on , A., unlawfully, did insert in a certain register then and there lawfully kept as the register of births [etc.], of the parish of a certain entry, known by him, the said A., to be false, and relating to the birth (*or* "marriage" [etc.]) of

OR,

At on A., unlawfully, did erase from a certain register then and there lawfully kept as the register of births (*or* "marriages" [etc.]), of the parish of a certain material part of such register, to wit, [*Describe the material part erased.*]

FALSELY CERTIFYING EXTRACTS FROM REGISTERS.

At on A., being a person authorized and required by law to give certified copies of entries in a certain register then and there lawfully kept as the register of births (*or* "marriages" [etc.]), of the parish of unlawfully did certify a certain writing to be a true copy of (*or* "extract from") a certain entry in the said register, to wit, an entry of the birth (*or* "marriage" [etc.]) of

FALSE ENTRIES IN BOOKS RELATING TO PUBLIC FUNDS. (2)

At on A., in a certain book of account kept by the Bank, in which said book were then kept and entered the accounts of the owners of certain transferable stock, [*annuity or other public fund.*] wilfully, unlawfully and with intent to defraud, did make a certain false entry to wit, [*Describe the false entry.*]

FRAUDULENT TRANSFER OF STOCK.

At on , A, a transfer of a certain share and interest of and in certain stock, [*annuity or other public fund*], transferable at the Bank, to wit, the share and interest of B., of and in [*Mention the amount and description of the stock, etc.*], did unlawfully, and with intent to defraud, make, in the name of C., he the said C. not being then the true and lawful owner of the said stock [etc,], or any part thereof.

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(1) See Article 435, *ante*, p. 410.
(2) See Article 440, *ante*, p. 412.

MAKING FALSE DIVIDEND WARRANTS.

At on , A., being a clerk in the employ of the Bank, unlawfully, and with intent to defraud, did make out and deliver to one B., a certain dividend warrant for five hundred dollars being a greater amount than the said B. was then entitled to, the amount to which the said B. was then entitled being only three hundred dollars.

FORGERY OF A TRADE MARK.

At on , A., unlawfully did forge (*or* "cause to be forged"), a certain trade-mark, to wit, [*Describe it*].

FALSELY APPLYING A TRADE-MARK.

At on , A did unlawfully, falsely apply (*or* "cause to be applied") to certain goods, to wit, [*Describe them*] a certain trade-mark to wit, [*Describe it*], (*or* "a mark so nearly resembling a certain trade mark to wit" [*Describe it*], "as to be calculated to deceive.").

PERSONATION.

At on , A., unlawfully did personate B., (*or* "the administrator," *or* "widow," *or* "next of kin of the late C.," *or* "the wife of D."), with intent then and there and thereby fraudulently to obtain [*Describe the money or property intended to be obtained*].

PERSONATION AT AN EXAMINATION.

At on , A., unlawfully, falsely and with intent to gain an advantage for himself, (*or* "one B."), did personate C., a candidate at a competitive (*or* "qualifying") examination held under authority of law, (*or* "in connection with the McGill College University, of Montreal.")

OR.

At on , A, unlawfully falsely and with intent to gain an advantage for himself, (*or* "one B."), did procure himself (*or* "the said B.") to be personated as C., a candidate at a competitive, (*or* "qualifying") examination, held under authority of law, (*or* "in connection with the University of Laval, at Montreal.")

PERSONATING AN OWNER OF STOCK.

At on , A, unlawfully, falsely and deceitfully did personate B., the owner of a certain share and interest in certain stock, [*annuity or other public fund*] to wit, [*Give the amount and description of the said stock*, etc.], then transferable at the Bank, and did, thereby, and by means of such personation, then and there transfer (*or* "endeavor to transfer,") the said share and interest of the said B., in the said stock, [etc.], as if he the said A. were the lawful owner thereof

ACKNOWLEDGING AN INSTRUMENT IN A FALSE NAME.

At on , A., did, before the Court of Queens Bench for the province of Quebec, sitting in and for the District of Montreal, (*or* "the Honorable Mr Justice —" [etc.]), unlawfully, and without lawful authority or excuse, acknowledge in the name of B., a certain recognizance of bail, (*or* "*cognovit actionem*" [etc.]), to wit, [*Describe the instrument and the cause, action, or proceeding to which it relates.*].

COUNTERFEITING CURRENT SILVER COINS.

At on A. did unlawfully make (*or* " begin to make ") and counterfeit twenty pieces of false and counterfeit coin resembling (*or* " apparently intended to resemble and pass for ") current silver dollars (*or* " half dollars," *or* " ten cent pieces ").

BUYING, SELLING, OR DEALING IN COUNTERFEIT COIN.

At on A., did unlawfully and without lawful authority or excuse, buy (*or* " sell," *or* " receive," *or* " pay," *or* " put off ") twenty pieces of false and counterfeit coin, resembling (*or* " apparently intended to resemble and pass for ") current silver dollars, at and for a lower rate and value than the same imported (*or* " were apparently intended to import.).

IMPORTING COUNTERFEIT COIN.

At on , A., did unlawfully and without lawful authority or excuse, import and receive into Canada twelve pieces of false and counterfeit coin resembling (*or* " apparently intended to resemble and pass for ") current silver dollars, he the said A. then and there well knowing the same to be counterfeit.

EXPORTING COUNTERFEIT COIN.

At on , A., did unlawfully without lawful authority or excuse, export from Canada, twelve pieces of false and counterfeit coin resembling (*or* " apparently intended to resemble and pass for ") current silver dollars, he the said A. then and there well knowing the same to be counterfeit.

MAKING COINING INSTRUMENTS.

At on , A., unlawfully and without lawful authority or excuse, did make, (*or* " mend," *or* " begin or proceed to make or mend ") one puncheon (*or* " counter puncheon " [etc]), in and upon which there was then made and impressed (*or* " which would make and impress " *or* " which was adapted and intended to make and impress ") the figure and apparent resemblance of one of the sides, to wit, the head-side of a current silver dollar.

OR,

At on , A., unlawfully and without lawful authority or excuse, did make (*or* " buy," *or* " sell," *or* " have in his possession ") one edger (*or* " edging tool," *or* " collar " [etc.]), adapted and intended for the marking of coin round the edges with letters (*or* " grainings," [etc.]), apparently resembling those on the edges of current silver dollars, he, the said A., then well knowing the same to be so adapted and intended.

BRINGING COINING INSTRUMENTS INTO CANADA.

At on , A., unlawfully, knowingly and without lawful authority or excuse, did convey out of Her Majesty's Mints into Canada, one puncheon (*or* " counter-puncheon," *or* " matrix " [etc.]) used or employed in or about the coining of coin.

CLIPPING CURRENT COIN.

At on , A., did unlawfully impair (*or* " diminish," *or* " lighten "), twelve pieces of current silver coin called dollars, with intent that each of the said twelve pieces so impaired, (*or* " diminished," *or* lightened ") might pass for a current silver dollar.

DEFACING, AND TENDERING CURRENT COIN, SO DEFACED.

At on , A., unlawfully did deface one piece of current silver coin, called a dollar, by then and there stamping thereon certain names (*or* "words"), to wit, , and did afterwards unlawfully tender the said current silver coin, so defaced as aforesaid.

POSSESSING COUNTERFEIT COIN, WITH INTENT.

At on , A., unlawfully, had in his custody and possession twelve pieces of counterfeit coin resembling (*or* "apparently intended to resemble, and pass for") current silver dollars, with intent to utter the same, he the said A. then well knowing the same to be counterfeit.

COUNTERFEITING CURRENT COPPER COIN.

At on , A., unlawfully, did make and counterfeit two hundred pieces of false and counterfeit coin resembling (*or* "apparently intended to resemble and pass for") the current copper coin called a one cent piece.

COUNTERFEITING FOREIGN COIN.

At on , A., unlawfully, did make (*or* "begin to make") and counterfeit coin resembling (*or* "apparently intended to resemble and pass for") the silver coin of a foreign country, to wit, the silver coin of the United States of America, called a dollar.

BRINGING COUNTERFEIT FOREIGN COIN INTO CANADA.

At on , A., unlawfully and without lawful authority or excuse, did bring into (*or* "receive in") Canada, twenty pieces of false and counterfeit coin resembling (*or* "apparently intended to resemble and pass for") the silver coin of a foreign country, to wit, the silver coin of the United States of America called a dollar, he the said A then well knowing the same to be counterfeit.

UTTERING COUNTERFEIT COIN.

At on , A., unlawfully, did utter to B., one piece of counterfeit coin resembling (*or* "apparently intended to resemble and pass for") the current silver coin called a dollar, he the said A. then well knowing the same to be counterfeit.

UTTERING LIGHT COIN.

At on , A., unlawfully, did utter as being current a certain silver coin, to wit, a silver dollar of less than its lawful weight, he the said A. then well knowing the said coin to have been impaired, (*or* "diminished" *or* "lightened") otherwise than by lawful wear.

UTTERING UNCURRENT COIN.

At on , A., unlawfully, and with intent to defraud, did utter, as being a current silver dollar, a certain silver coin, not being a current silver coin but resembling in size figure and color a current silver dollar, and being of less value than a current silver dollar.

UTTERING MEDALS, ETC., AS CURRENT COIN. (1)

At on , A., unlawfully and with intent to defraud, did utter as being a current silver dollar, a certain medal, (*or* "piece of metal") resembling, in size figure and color, a current silver dollar, and being of less value than a current silver dollar.

UTTERING COUNTERFEIT COPPER COIN.

At on , A , unlawfully, did utter to B., one piece of counterfeit coin resembling (*or* "apparently intended to resemble and pass for", the current copper coin called one cent, he the said A. then well knowing the same to be counterfeit.

ARSON.

At on , A., unlawfully, wilfully, without legal justification or excuse, and without color of right, did set fire to a certain building, to wit, a dwelling-house belonging to B., and situated in aforesaid.

OR,

At on , A., unlawfully, wilfully, without legal justification or excuse, without color of right, and with intent to defraud, did set fire to a certain building, to wit, a store situated in aforesaid and belonging to him the said A.

OR,

At on , A., unlawfully, wilfully, without legal justification or excuse, and without color of right, did set fire to a certain stack of vegetable produce (*or* "of mineral" *or* "vegetable fuel") to wit. [*Describe the stack*] belonging to B.

OR,

At on , A., unlawfully, wilfully, without legal justification or excuse, and without color of right, did set fire to a certain mine (*or* "well of oil," *or* "ship") to wit, [*Describe it*] belonging to B.

OR,

At on , A., unlawfully, wilfully without legal justification or excuse, and without color of right, did set fire to certain timber (*or* "materials") to wit, [*Mention the quantity and description of the timber, or materials*], placed in a certain shipyard, to wit, for building (*or* "repairing" *or* "fitting out") a certain ship, to wit, [*Mention the ship*].

ATTEMPT TO COMMIT ARSON.

At on , A., unlawfully, wilfully, without legal justification or excuse, and without color of right, did attempt to set fire to a certain building, to wit, a dwelling-house belonging to B., and situated in aforesaid.

WIFULLY SETTING FIRE TO CROPS, ETC.

At on , A., unlawfully, wilfully, without legal justification or excuse, and without color of right, did set fire to a

(1) See Article 475 (*b*), *ante*, p. 431.

certain crop (*or* "wood," *or* "forest," *or* "coppice," *or* "plantation" *or* "heath" *or* "gorse," *or* "furze," *or* "fern") to wit, (*Describe the crop*, [etc.]), the property of B.

WILFULLY SETTING FIRE TO TREES, ETC.

At on , A., unlawfully, wilfully, without legal justification or excuse, and without color of right, did set fire to certain trees (*or* "lumber," *or* "timber," *or* "logs," *or* "floats" *or* "booms," etc.), to wit, [*Describe and give the situation of the trees*, etc.], the property of B., and did thereby injure (*or* "destroy") the same

NEGLIGENTLY SETTING FIRE TO FOREST, ETC.

At on , A., negligently, recklessly, and with wanton disregard of consequences, (*or* "in violation of a certain provincial law, to wit, "), did unlawfully set fire to a certain forest (*or* "tree," *or* "manufactured lumber," etc.), situated (*or* "being") on the Crown domain (*or* "land leased or lawfully held for the purpose of cutting timber," etc.), so that the said forest [etc.], was injured (*or* "destroyed.")

PLACING OR THROWING EXPLOSIVES WITH INTENT TO DESTROY A BUILDING, ETC.

At on , A., unlawfully, wilfully, without legal justification or excuse, and without color of right, did place near (*or* "throw into") a certain building (*or* "ship") to wit, [*Describe the building or ship*] a certain explosive substance, to wit, five pounds of gunpowder, with intent, thereby, then and there, to destroy (*or* "damage") the said building (*or* "ship.")

MISCHIEF ON RAILWAYS. (1)

At on , A., unlawfully and in a manner likely to cause danger to valuable property, to wit, to a certain engine and certain cars of the Canadian Pacific Railway, on their railway at aforesaid, did displace a rail (*or* "sleeper," etc.), on and belonging to the said railway.

OR,

At on , A., did unlawfully make a false signal on (*or* "near") the railway of the Grand Trunk Railway Company at aforesaid, in a manner likely to cause danger to valuable property, to wit, to a certain engine and certain cars of the said Grand Trunk Railway Company, on their said railway.

MISCHIEF ON RAILWAYS WITH INTENT. (2)

At on , A., did unlawfully break and injure a rail (*or* "sleeper") on and belonging to the railway of the Grand Trunk Railway Company, at aforesaid, with intent thereby then and there to cause danger to a certain engine and certain cars of the said Grand Trunk Railway Company on their said railway.

WILFULLY REMOVING MARINE SIGNALS.

At on , A., unlawfully, wilfully, without legal justification or excuse, and without color of right, did alter, (*or* "remove," *or* "conceal,") a certain signal (*or* "buoy") used upon the river St Lawrence, for the purposes of navigation.

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(1) See Article 489, *ante*, p. 438.
(2) See clause 2 of Article 489. *ante*, p. 439.

WILFULLY, INJURING BOOMS, etc.

At on A., unlawfully, wilfully, without legal justification or excuse, and without color of right, did break (*or* "injure", (*or* "cut", or "loosen", *or* "remove", *or* "destroy"), a certain dam (*or* "pier", *or* "slide", *or* "boom", *or* "raft", *or* "crib of timber"), the property of B.

MISCHIEF TO MINES.

At on A, did unlawfully cause a quantity of water (*or* "earth," *or* "rubbish") to be conveyed into a certain mine (*or* "well of oil") to wit, [*Describe it*], the property of B., with intent thereby then and there to injure (*or* "obstruct the working of") the said mine (*or* "well of oil").

OR,

At on A., unlawfully did damage the shaft (*or* "a passage", of a certain mine (*or* "well of oil"), to wit, [*Describe it*], the property of B., with intent thereby then and there to injure (*or* "obstruct the working of") the said mine (*or* "well of oil").

OR,

At on A., unlawfully, did damage (*or* "unfasten") a certain rope (*or* "chain" *or* "tackle") used in a certain mine, to wit, [*Describe it*], the property of B., with intent, thereby, then and there to render the same useless, and with intent, thereby, then and there to injure (*or* "obstruct the working of") the said mine.

WILFULLY DESTROYING A HOUSE, ETC., AND ENDANGERING LIFE. (1)

At on , A., unlawfully, wilfully, hout legal justification or excuse, and without color of right, did by means wit n explosion destroy (*or* "damage") a certain dwelling-house (*or* "ship," or "boat") to wit, [*Describe it*], the property of B., there being certain persons to wit, C., and D., then in the said dwelling-house [etc.], and the said destruction (*or* "damage") did then and there cause actual danger to life.

WILFULLY DESTROYING A RIVER BANK, ETC., AND CAUSING DANGER OF INUNDATION.

At on , A, unlawfully, wilfully, without legal justification or excuse, and without color of right, did destroy, (*or* "damage") the bank (*or* "dyke") of a certain river called the river St. Lawrence, whereby and by means whereof there was actual danger of inundation.

WILFULLY DESTROYING BRIDGES.

At on , A., unlawfully, wilfully, without legal justification or excuse, and without color of right, did destroy (*or* "damage") a certain bridge (*or* "viaduct," *or* "aqueduct") situated in aforesaid, and over (or "under") which a certain highway (*or* "railway," *or* "canal") to wit, [*Describe it*], passes, and the said destruction (*or* "damage") was so done by the said A., with intent and so as to render the said bridge (*or* "viaduct" *or* "aqueduct," *or* "highway," *or* "railway" or "canal") dangerous and impassable.

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(1) See Article 499, *ante*, p. 442.

WILFULLY DESTROYING OR DAMAGING A RAILWAY.

At on , A., unlawfully, wilfully, without legal justificaton or excuse, and without color of right, did destroy (*or* "damage") a certain railway, to wit, [*Describe it*] with intent to render and so as to render the same dangerous and impassable.

DESTROYING A WRECKED SHIP.

At on , A., unlawfuliy, wilfully, without legal justification or excuse, and without color of right, did destroy (*or* "damage") a certain ship, to wit, [*Describe it*], which was then and there in distress (*or* "wrecked.")

WILFULLY DESTROYING CATTLE, ETC.

At on , A., unlawfully, wilfully, without legal justification or excuse and without color of right, did destroy (*or* "damage") one cow, the property of B., by then and there killing (*or* "maiming," *or* "poisoning," *or* "wounding") the said cow.

WILFULLY DAMAGING A SHIP WITH INTENT TO DESTROY OR RENDER IT USELESS.

At on A, unlawfully, wilfully, without legal justification or excuse, and without color of right, did damage a certain ship, to wit, [*Describe it*] with intent to destroy (*or* "render useless") the said ship.

WILFULLY DAMAGING A CANAL, ETC.

At on A., unlawfully, wilfully, without legal justification or excuse, and without color of right, did damage a certain canal (*or* "navigable river") to wit, [*Describe it*] by then and there interfering with and breaking down the flood-gates (*or* "sluices") thereof, with intent and so as thereby, then and there, to obstruct the navigation thereof.

WILFULLY DAMAGING THE SLUICE OF A PRIVATE WATER.

At on A , unlawfully, wilfully, without legal justification or excuse, and without color of right, did damage (*or* "destroy") the flood-gate (*or* "sluice") of a certain private water, to wit, the fish pond of B., situated in aforesaid, with intent to take (*or* "destroy,") (*or* "so as to cause the loss or destruction of") the fish therein.

DAMAGING A PRIVATE FISHERY.

At on A , unlawfully, wilfully, without legal justification or excuse, and without color of right, did damage a certain private fishery (*or* "salmon river"), by putting into it a large quantity of lime, with intent, thereby, then and there to destroy the fish then and there being therein.

WILFULLY DESTROYING GOODS IN PROCESS OF MANUFACTURE.

At on A., unlawfully, wilfully, without legal justification or excuse, and without color of right, did destroy (*or* "damage") certain goods, to wit, [*Describe them*] the property of B., and then being in process of manufacture, with intent thereby then and there to render the same useless.

WILFULLY DAMAGING MANUFACTURING MACHINES.

At on A., unlawfully, wilfully, without legal justification or excuse, and without color of right, did damage (*or* " destroy ") certain agricultural (*or* " manufacturing ") machines, to wit, [*Describe them*], the property of B., with intent thereby then and there to render the same useless.

WILFULLY DAMAGING OR DESTROYING TREES IN A PARK, ETC.

At on A , unlawfully, wilfully, without legal justification, and without color of right, did damage, (*or* " destroy ") two fir trees the property of B., then growing in a certain park, (*or* " pleasure ground," *or* " garden," *or* " land adjoining and belonging to the dwelling-house ") of the said B., thereby then and there injuring the said trees to an extent exceeding in value the sum of five dollars.

WILFULLY DAMAGING A POST LETTER BAG, ETC.

At on A., unlawfully, wilfully, without legal justification or excuse, and without color of right, did damage (*or* " destroy ") a certain post-letter bag (*or* " post-letter ") the property of the Post-master General.

WILFULLY DAMAGING A STREET LETTER BOX.

At on A., unlawfully, wilfully, without legal justification or excuse, and without color of right, did damage (*or* " destroy,") a certain street letter box (*or* " pillar box ") established by authority of the Postmaster-General for the deposit of letters and other mailable matter.

WILFULLY DAMAGING A PARCEL SENT BY POST.

At on A., unlawfully, wilfully, without legal justification or excuse, and without color of right, did damage (*or* " destroy,") a certain parcel sent by parcel post, the property of the Post-master General.

WILFULLY DAMAGING, BY NIGHT, PROPERTY TO AMOUNT OF TWENTY DOLLARS.

At on A., unlawfully, wilfully, without legal justification or excuse, and without color of right, did damage, (*or* " destroy,") by night, seven birch trees, the property of B , then growing in a plot of land belonging to the said B., thereby then and there injuring the said trees to the amount of twenty dollars.

OR,

At on , A., unlawfully, wilfully, without legal justification or excuse, and without color of right, did damage (*or* " destroy "), by night, thirty five patterns for the making of waterproof coats, the property of B., thereby then and there injuring the said patterns to the amount of twenty dollars.

WILFULLY DESTROYING, BY DAY, PROPERTY TO THE AMOUNT OF TWENTY DOLLARS.

At on , A., unlawfully, wilfully without legal justification or excuse, and without color of right, did damage (*or* " destroy "), by day, one crate of crockery and glass ware, the property of B ,

thereby then and there injuring the said crockery and glass ware o the amount of twenty dollars.

WILFUL INJURIES TO POLL-BOOKS, ETC.

At on , A., unlawfully, wilfully, without legal justification or excuse, and without color of right, did destroy, (*or* "injure" *or* "obliterate", a certain writ of election, (*or* "return to a writ of election," *or* "poll-book," *or* "voters' list," *or* "ballot," [etc.]) to wit, [*Describe the election writ, etc.*] prepared and drawn out according to a certain law in regard to Dominion (*or* "provincial," *or* "municipal" *or* "civic") elections, to wit, the Act [*Cite the Act applying to the case in hand*].

OR,

At on , A., unlawfully, wilfully, without legal justification or excuse, and without color of right, did make (*or* "cause to be made") a certain erasure [etc.], to wit, [*Describe it*] in a certain writ of election [etc.], to wit, [*Describe it*] prepared and drawn out according to a certain law in regard to Dominion [etc.] elections, to wit, the Act [*Cite the Act which is applicable to the case in hand*].

INJURIES TO BUILDINGS BY TENANTS.

At on , A., being then possessed of a certain dwelling-house situated in aforesaid, and then held by him the said A., as tenant thereof, for an unexpired term of three years, did unlawfully, wilfully, without legal justification or excuse, without color of right, and to the prejudice of B , the owner thereof, pull down and demolish the said dwelling-house.

WILFULLY DESTROYING TREES AFTER TWO PREVIOUS CONVICTIONS. (1)

At on , A , unlawfully, wilfully, without legal justification or excuse and without color of right did damage (*or* "destroy") one shrub, so that the injury done by such damage (*or* "destruction") amounted to the value of fifty cents, the said shrub being the property of B., and then growing in a certain plot of land situated and being in aforesaid: And the said jurors say, that, heretofore, to wit, at on , (before the committing of the hereinbefore mentioned offence), the said A. was duly convicted, before C., one of Her Majesty's Justices of the Peace for the District of of having at on [*Set out the offence forming the basis of the first conviction*], and was adjuged, for his said offence, to pay, [etc.], and, in default of payment, [etc.], to be imprisoned, [etc.]: And the said jurors further say, that heretofore, to wit, at on (before the committing of the firstly hereinbefore mentioned offence. but after the next hereinbefore mentioned conviction), the said A. was again duly convicted before D., one of Her Majesty's Justices of the Peace for the District of , of having at on [*Set out the second conviction*]: And so the jurors aforesaid say, that, on the day and year first aforesaid the said A., unlawfully wilfully without legal justification or excuse and without color of right, did damage (*or* "destroy") the said shrub, and did thereby do injury amounting to the value of fifty cents, after having been twice convicted of the like offence of wilfully damaging (*or* "destroying") a shrub, (*or* "tree" [etc.]), and doing injury amounting to the value of at least twenty five cents.

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(1) See comments and authorities under Art. 478, *ante*, p. 432, as to second offences. And see, also, Articles 628 and 676, *post*.

WILFULLY DAMAGING OR DESTROYING VEGETABLE PRODUCTIONS GROWING IN A GARDEN, ETC. (1)

At , on , A., unlawfully, wilfully, without legal justification or excuse, and without color of right, did damage (*or* "destroy") fifty cauliflowers, the property of B., then growing in a certain garden of the said B., situated in aforesaid: And the said jurors say, that, heretofore, to wit, at on (before the committing of the hereinbefore mentioned offence), the said A. was duly convicted before C., one of Her Majesty's Justices of the Peace, for the District of of having at on , [*Set out the offence forming the basis of the first conviction*], and was adjuged, for his said offence, to pay [etc.], and in default of payment [etc.], to be imprisoned [etc.]: And so the jurors aforesaid say, that on the day and year first aforesaid that A. did unlawfully wilfully, without legal justification or excuse and without color of right, damage (*or* "destroy") the said forty cauliflowers after having been previously convicted of the like offence of wilfully damaging (*or* "destroying") vegetable productions in a garden [etc.]

COMBINATION IN RESTRAINT OF TRADE.

At , on , A., unlawfully conspired, combined, agreed and arranged with B., C., and D., and with the Company, to unduly limit the facilities for transporting, (*or* "producing," *or* "supplying," *or* "storing," *or* "dealing in" *or* "manufacturing,") cotton goods [*etc.*], a subject of trade and commerce.

OR.

At on A, unlawfully conspired combined, agreed, and arranged with B. C., and D., and with the Company, to uuduly prevent and lessen competition in the production (*or* "manufacture," *or* "purchase," *or* "Barter," *or* "sale," *or* "transportation," *or* "supply,") of woollen goods [*etc.*], a subject of trade and commerce.

CRIMINAL BREACH OF CONTRACT.

At on A., unlawfully, and wilfully did break a certain contract, to wit, [*Describe it*], theretofore made by him, well knowing (*or* "having reasonable cause to believe") that the probable consequences of his so doing would be to endanger human life (*or* "cause serious bodily injury," *or* "expose valuable property to destruction," *or* "serious injury.").

INTIMIDATION.

At on A., and B., unlawfully, and without lawful authority, did use violence to (*or* "injure the property of") C., by [*Describe the personal violence or the injury to property, (as the case may be)*], with a view to compel the said C. to employ D., E., and F., whom he the said C. had a lawful right to refuse to employ (*or* "to compel the said C. to discharge from and refuse to keep in his employ G, and H., whom he the said C. had a lawful right to retain in his employ.")

OR.

At on A., B., and C., being workmen in the employ of D., unlawfully, wrongfully and without lawful au-

(1) See comments and authorities under Art. 478, *ante*, p. 432, as to second offences. And see Articles 628 and 676, *post*, as to Indictment and Procedure.

thority did, by means of threats of using violence to (*or* "of injuring the property of") the said D., then and there intimidate the said D., with a view to compel the said D. to raise and advance the wages of them the said A., B., and C.

OR,

At, on A., and B., unlawfully, wrongfully, and without lawful authority, did persistently follow C., from place to place, with a view to compel the said C., to cease working for D., he the said C. having a lawful right to continue to work for the said D.

INTIMIDATION, BY PICKETING.

At on , and on divers other days before and since that date, A., and B., unlawfully, wrongfully, and without lawful authority, did beset and watch the building, workshop, and premises of C., where D. was then working in the employ of the said C., with a view to compel the said D. from working in the employ of the said C., he the said D. having a lawful right to continue to work in the employ of the said C., (*or* "with a view to compel the said C. to discharge and to discontinue employing the said D., he the said C. having a lawful right to continue the said D. in his employ.").

INTIMIDATION, BY ASSAULTS OR THREATS, IN PURSUANCE OF AN UNLAWFUL COMBINATION.

At on , A., B., and C., having, before then, unlawfully conspired, combined, confederated and agreed together to raise the rate of wages, then usually payable to workmen, in a certain trade, business and manufacture, to wit, the trade, business and manufacture of brass founding (*or* "calico printing," *or* "cotton spinning" *or* "silk weaving" *or* "engine making" *or* "cigar making," *or* "brickmaking," [etc.]), did, then and there, in pursuance of the said conspiracy, unlawfully make an assault upon (*or* "use violence" *or* "threats of violence to") B., with a view to hinder him from working (*or* "being employed") at such trade, business, and manufacture.

CONSPIRACY TO COMMIT AN INDICTABLE OFFENCE.

At on , A., B., and C., unlawfully, did conspire, combine, confederate and agree together to commit a certain indictable offence, to wit, the crime of arson, (*or* "burglary" *or* "aggravated assault," *or* "rape" *or* "forgery," [etc.]), by then and there conspiring, combining, confederating, and agreeing together to unlawfully [etc.] set fire to (*or* "unlawfully break and enter" *or* [etc.]), [*Describe the crime agreed upon and mention the property or person, or both, as the case may be), to be affected thereby.*] (A count may be added setting out the overt acts of the conspiracy. (1)

CONSPIRACY TO BRING FALSE ACCUSATION OF CRIME. (2)

At on , A., B., and M., B., his wife, C. D., and E. F., unlawfully did conspire, combine, confederate and agree together to prosecute G. H., for an alleged offence, to wit, upon a false charge and accusation falsely charging and accusing that he the said G. H., had, then, lately before, unlawfully assaulted, ravished and carnally known the said M. B., without her consent, they the said A. B., M. B., C. D., and E. F., then well knowing the said G. H., to be innocent of the said alleged offence.

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(1) For counts setting out the overt acts, see next form. Although, in an indictment for conspiracy, it is usual to set out the overt acts, that is, those acts which the conspirators or any of them may have done towards carrying the common purpose into effect, it is not essential; for the conspiracy itself is the offence. (See cases cited at p. 337, *ante*.)

(2) See Article 152, *ante*, p. 98.

And the said jurors further present that, afterwards, at aforesaid, on the day and year aforesaid, the said A. B., and M. B, his wife, C. D., and E. F., in pursuance of their said conspiracy, did attend together before J. N., Esquire, one of Her Majesty's Justices of the Peace for the District of , to whom they, the said A. B., and M. B., his wife, C. D., and E. F., did, then and there, make the said false charge and accusation, falsely charging and accusing the said G. H., with and of the rape aforesaid; and, then and there, before the said J. N., she the said M. B., in the presence of and in company with the said A. B., C. D., and E. F., and in further pursuance of the said conspiracy, did make her written and sworn information and complaint, falsely charging and accusing that the said G. H., had, then, lately before, unlawfully assaulted, ravished, and carnally known her, the said M. B., without her consent.

And the said jurors further present, that, afterwards, to wit, in the Court of Queens Bench [*or* (name the Court), *as the case may be*] of the province of, holden at in and for the district (*or* "county") of on , in the year aforesaid, they the said A. B., and M. B., his wife, C. D., and E F., in further pursuance of their said conspiracy, did cause and procure to be falsely laid and exhibited, before the Grand Jury then and there sworn before the said Court, a bill of indictment falsely charging and accusing the said G. H, with and of the rape aforesaid; which said bill of indictment was by the said Grand Jury, then and there, returned into the said Court, thus endorsed;—"No Bill."

ATTEMPT TO COMMIT AN INDICTABLE OFFENCE.

At on , A., unlawfully did attempt to unlawfully steal one gold watch of the value of sixty five dollars, of the goods and chattels of B. (1)

OR,

At on , A., unlawfully, did attempt, by false pretences, to obtain from B, one horse of the value of seventy dollars, the property of the said B., with intent to defraud.

OR,

At on A., unlawfully, did solicit and advise B. to unlawfully steal one piano of the goods and chattels of C., whereby he the said A., did unlawfully attempt to commit the indictable offence of theft.

OR,

At on , A., unlawfully, did attempt to commit the indictable offence of bigamy (*or* "burglary" [etc.]), by then and there. [*Set out the means used in making the attempt.*]

ACCESSORY AFTER THE FACT INDICTED WITH THE PRINCIPAL OFFENDER.

(*After charging A., as the principal offender, with the principal offence, proceed thus*):—

And the said jurors further present that, C, well knowing the said A. to have done and committed the said offence, as aforesaid, did, after the same was so done and committed as aforesaid, to wit, on the day and year aforesaid, unlawfully receive, comfort and assist him, the said A., in order to enable him to escape.

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(1) See pp. 129, 250, 251, 252. 257 and 485, *ante*, for forms of indictment for attempts, in cases of Sodomy, Murder, Suicide, Rape, Defilement of Girls, and Arson.

ACCESSORY AFTER THE FACT, INDICTED ALONE, THE PRINCIPAL OFFENDER HAVING BEEN CONVICTED.

(*After stating the principal offence and the principal offender's conviction, proceed thus*):—

And the said jurors further present, that C., well knowing the said A. to have done and commited the said offence, as aforesaid, did, after the same was so done and committed, as aforesaid, to wit, on the day and year aforesaid, unlawfully receive, comfort, and assist him, the said A., in order to enable him to escape.

TABLE OF OFFENCES UNDER TITLE VI.

INDICTABLE OFFENCES.

No.	Art.	Offence.	Punishment.	Tribunal.
1	306 356	Theft of things under seizure (1)	Seven years; 2nd offence, ten years	Either Sup. Ct. Cr. Juris., or Genl. or Quar. Sess.
2	307 331	Killing cattle, with intent to steal the carcase, etc.	Fourteen years	do
3	308 320	Theft by Agent	Fourteen years	do
4	309 320	Theft by holder of power of attorney	Fourteen years	do
5	310 320	Misappropriating money, etc., held under direction	Fourteen years	do
6	312 354	Fraudulent concealment of gold, etc. by mining partner	Two years	do
7	314	Receiving stolen property (1)	Fourteen years	do
8	315	Receiving stolen post-letter, etc.	Five years	do
9	319	Thefts by clerks, servants, Bank employees, Government and other officials	Fourteen years	do
10	321	Public servants refusing to deliver up books, etc.	Fourteen years	do
11	322	Theft by tenant or lodger	Two years & four years	do
12	323	Stealing a will	Life	do
12a	324	Stealing a document of title	Three years	do
13	325	Stealing judicial or official documents	Three years	do
14	326	Stealing post letter bags, etc.	Life	do
15	327	Stealing a post letter, etc.	Seven years	do
16	328	Stealing other mailable matter	Five years	do
17	(2)	Unlawfully opening a post-letter, etc.	Five years	do
18	329	Stealing election documents (3)	Fine, or seven yrs, or both	do
19	330	Stealing railway, tramway, or steamer ticket	Two years	do

(1) It will be seen that under Art. 783, *post*, whenever a person is charged before a magistrate with having committed theft, or obtaining property by false pretences or receiving stolen property, and the value of the property in question does not exceed ten dollars the magistrate may, subject to the provisions of Part LV, try the charge summarily.

(2) See sec. 89 (which is unrepealed) of R.S.C., c. 35, set out at p. 304, *ante*.

(3) The fine is in the discretion of the Court.

TABLE OF OFFENCES UNDER TITLE VI.—*Continued.*

INDICTABLE OFFENCES.

No.	Act.	Offence.	Punishment.	Tribunal.
20	331	Stealing cattle. (1)	Fourteen years	Either Sup. Ct. Cr. Juris., or Genl. or Quar. Sess.
21	334	Stealing oysters or oyster brood	Seven years	do
22	334	Dredging in oyster beds	Three months	do
23	335	Stealing fixtures in buildings or lands	Seven years	do
24	336	Stealing trees, etc., worth $25	Two years	do
25	336	Stealing trees, etc., worth $5, in a garden, etc.	Two years	do
26	337	Stealing a tree, etc., worth 25c. after two other convictions.	Five years	do
27	338	Fraudulently taking, etc, drift timber, etc	Three years	do
28	341	Stealing plants, etc., in a garden after one other conviction	Three years	do
29	343	Stealing ores of metals, etc.	Two years	do
30	344	Stealing from the person	Fourteen years	do
31	345	Stealing in a dwelling-house	Fourteen years	do
32	346	Stealing by picklocks, etc.	Fourteen years	do
33	347	Stealing goods in process of manufacture	Five years	do
34	348	Fraudulent disposal of goods entrusted to manufacture	Two years	do
35	349	Stealing from ships, wharves, etc.	Fourteen years	do
36	350	Stealing wreck	Seven years	do
37	351	Stealing from a railway station, or engine, etc.	Fourteen years	do
38	353 328	Fraudulently destroying a will	Life	do
39	353 324	Fraudulently destroying other documents	Three years	do
40	354	Fraudulent concealment of property	Two years	do
41	355	Bringing stolen property into Canada	Seven years	do
42	356	Stealing in cases not otherwise provided for (2)	Seven y. 2d offence, ten y.	do
43	359	Obtaining by false pretences (3)	Three years	do
44	360	Obtaining execution of valuable security by false pretence	Three years	do
45	361	Falsely pretending to send money, etc., in a post-letter	Three years	do
46	362	Obtaining passage by false ticket	Six months	do
47	363	Criminal breach of trust	Seven years	do
48	364	False accounting by a director or official of a corporate body	Seven years	do
49	(4)	Fraudulent preference by a bank president, director, etc.	Two years	do
50	(4)	False bank returns etc., by bank officials	Five years	do
51	(5)	Unlawfully using the title of "Bank," etc.	Fine $1000, or five years	do

(1) This means live cattle. The stealing of a dead cow, etc., is punishable under Art. 356, by seven years.

(2) Art. 357 provides that when the value of property stolen exceeds $200, two years shall be added to the punishment.

(3) Under Art. 783, when a person is charged with obtaining by false pretences property not exceeding $10 in value, the Magistrate may try the charge summarily.

(4) See secs. 97 and 99 (unrepealed) of the *Bank Act*, R.S.C., c. 31, set out at pp. 325, 326, *ante*.

(5) See Secs. 100 and 101 (unrepealed) of the *Bank Act*, set out at p. 326, *ante*.

TABLE OF OFFENCES UNDER TITLE VI.—*Continued.*

INDICTABLE OFFENCES.

No.	Art.	Offence.	Punishment.	Tribunal.
52	365	Making false Prospectus or statement, by promoter or director, etc., of Company	Five years	Either Sup. Ct. Cr. Juris., or Genl. or Quar. Sess.
53	366	False accounting by clerk or servant.	Seven years	do
54	367	False statement by public officer	Five years	do
55	368	Fraudulent transfer by a debtor	Fine $800, and one year.	do
56	369	Fraudulent falsification of books by a debtor.	Ten years	do
57	370	Concealing encumbrances, etc	Fine or two yrs, or both.	
58	371	Frauds in respect of registration of titles	Three years	do do
59	372	Fraudulent sales of real property	One year	do
60	373	Fraudulent hypothecation of real property	One year and $100 Fine.	do
61	374	Fraudulent seizures of land, in Quebec	One year	do
62	375	Fraudulent dealings in mined gold or silver	Two years	do
63	376	Giving or using false warehouse receipt	Three years	do
64	377	Disposal of merchandise in fraud of consignees	Three years	do
65	378	Making false receipts for grain, etc	Three years	do
66	380	Unlawfully selling wreck	Seven years	do
67	381	Secreting wreck, or receiving or keeping it, etc. (1)	Two years	do
68	382	Buying marine stores from persons under sixteen, (after two other convictions.)	Five years	do
69	385	Unlawfully applying marks to public stores	Two years	do
70	386	Taking marks from public stores	Two years	do
71	387	Unlawfully possessing public stores. (2	One year	do
72	390	Receiving Regimental necessaries. (3)	Five years	do
73	391	Receiving necessaries from marines, or deserters. (4)	Five years	do
74	392	Receiving a seaman's property, by purchase, exchange, or pawn. (5)	Five years	do
75	394	Conspiring to defraud	Seven years	do
76	395	Cheating at play	Three years	do
77	396	Fortune-Telling, witchcraft, etc	One year	do
78	398	Robbery with wounding, etc., or by a person armed	Life and whipping.	do
79	399	Robbery	Fourteen years	do
80	400	Assault, with intent to rob	Three years	do
81	401	Stopping mail with intent rob	Life	do
82	402	Compelling execution of documents	Life	do
83	403	Sending threatening Letter demanding money, etc	Fourteen years	do

(1) This may also be dealt with summarily, and in that case the penalty is $400 or six months imprisonment.

(2) When the value of the stores is less than $25 the offence is punishable summarily by a fine of $100, or six months imprisonment.

(3) This may also be dealt will summarily, the penalty in that case being $40, or six months.

(4) This may also be dealt will summarily; penalty $120 or six months.

(5) On summary conviction, the penalty is $100.

TABLE OF OFFENCES UNDER TITLE VI.—*Continued.*

INDICTABLE OFFENCES.

No.	ART.	OFFENCE.	PUNISHMENT.	TRIBUNAL.
84	404	Demanding with intent to steal	Two years	Either Sup. Ct. Cr. Juris., or genl. or Quar. Sess.
85	405	Extortion by threats to accuse of capital or infamous offences	Fourteen years	do
86	406	Extortion by threats to accuse of other offences	Seven years	do
87	408	Breaking a church, etc., and committing indictable offence	Fourteen years	do
87	409	Breaking a church, etc., with intent	Seven years. 2nd offence fourteen years (1)	do
89	410	Burglary	Life	do
90	411	House breaking	Fourteen years	do
91	412	House breaking with intent	Seven years	do
92	413	Breaking shop, etc	Fourteen years	do
93	414	Breaking shop with intent	Seven years	do
91	415	Entering or being found in a dwelling-house, at night (1)	Seven years. 2nd offence fourteen years	do
92	416	Being found armed with intent to break into a dwelling-house (1)	Seven years. 2nd offence fourteen years	do
93	417	Being disguised or having burglars, tools	Five years. 2nd offence fourteen years. (1)	do
	423 A	FORGERY:—		
94	(a) (b)	Of public document, (Imperial, Colonial Dominion or Provincial)	Life	do
95	(c) (g)	Of document of title to land	Life	do
96	(d)	Of registers of title to lands	Life	do
97	(e) (f)	Of land registration documents	Life	do
98	(h)	Of Notarial Acts, etc	Life	do
99	(i)	Of register of births, etc	Life	do
100	(j)	Of copy of Register of births, etc	Life	do
101	(k)	Of wills or probates, etc	Life	do
102	(l)	Of transfer of public funds, etc	Life	do
103	(m)	Of transfers of stocks, etc	Life	do
104	(n)	Of transfers of share in crown lands	Life	do
105	(o)	Of power of attorney for transfer of crown lands	Life	do
106	(p)	Of entry in book of shares or stock, etc	Life	do
107	(q)	Of Exchequer Bills	Life	do
108	(r)	Of bank notes, bills of exchange, etc	Life	do
109	(s)	Of scrip in lieu of land	Life	do
110	(t)	Of document of title to any public debt	Life	do
111	(u)	Of deed, bond, order, etc	Life	do
112	(v)	Of Accountable Receipt	Life	do
113	(w)	Of bill of lading Insurance Policy, etc	Life	do
114	(x)	Of Warehouse Receipt, Dock Warrant, etc	Life	do
	B			
115	(a)	Of any document relating to registry of personal property	Fourteen years (2)	do
116	(b)	Of any public register, not above mentioned	Fourteen years	do

(1) See Art. 418. See, also, comments and cases under Art. 478, *ante*, p. 432 as to second offences, in general.

(2) The Uttering of a forgery is subject to the same punishment as the forgery itself. (See Art. 424.)

TABLE OF OFFENCES UNDER TITLE VI.—*Continued.*

INDICTABLE OFFENCES.

No.	Art.	Offence.	Punishment.	Tribunal.
117	C (a) (b) (c)	Of Court Records, Judicial Documents, etc.	Seven years (1)	Either Sup. Ct. Cr. Juris., or Genl. or Quar. Sess.
118	(d) (e)	Of Magistrates' Documents, registers, etc.	Seven years	do
119	(f)	Of Copy Letters Patent, etc.	Seven years	do
120	(g)	Of Marriage Licenses or certificates	Seven years	do
121	(h)	Of contracts	Seven years	do
122	(i)	Of powers or letters of attorney	Seven years	do
123	(j)	Of request for money or goods, etc.	Seven years	do
124	(k)	Of acquittances vouchers, etc.	Seven years	do
125	(l)	Documents to be given in evidence in judicial proceedings	Seven years	do
126	(m)	Of railway, tramway or steamer tickets.	Seven years	do
127	(n)	Of any other document	Seven years	do
128	425	Counterfeiting public seals, etc.	Life	do
129	426	Counterfeiting seals of Courts, Registries, etc.	Fourteen years	do
130	427	Unlawfully printing proclamations, etc.	Seven years	do
131	428	Sending fraudulent telegrams in a false name	(2)	do
132	429	Sending a false telegram or letter with intent to alarm, etc.	Two years	do
133	430	Receiving or having forged bank-notes	Fourteen years	do
134	431	Fraudulently making a document without authority	(3)	do
135	432	Using a forged will or other instrument, or probate, etc., obtained thereon	Fourteen years	do
136	434	Making, having, or using, etc., instruments of forgery	Fourteen years	do
137	435	Counterfeiting stamps, etc.	Fourteen years	do
138	436	Falsifying registers	Fourteen years	do
139	437	Falsifying extracts from registers	Ten years	do
140	438	Falsely certifying entries in or extracts from registers	Seven years	do
141	439	Forging certificates, certifying false copies, etc.	Two years	do
142	440	Making false entries in books relating to public funds, etc.	Fourteen years	do
143	441	Issuing false dividend warrants	Seven years	do
144	447 450	Forging a trade-mark; or applying a forged trade-mark (4)	Two yrs & forft. of goods	do
145	448 450	Selling goods falsely marked (4)	Two yrs & forft. of goods	do
149	449 450	Selling marked bottles without assent of proprietor of trade-mark (4)	Two yrs & forft. of goods	do

(1) The Uttering of a forgery is subject to the same punishment as the forgery itself. (See Art 424.)

(2) Same punishment as for forgery of a document to the same effect as the telegram. (Art. 428.)

(3) Same punishment as for forgery of the document so fraudulently made without authority. (Art. 431.)

(4) These may be dealt with summarily; in which case the punishment is four months imprisonment, and $100, fine, as well as forfeiture. See p. 505, *post.*

TABLE OF OFFENCES UNDER TITLE VI.—*Continued.*

INDICTABLE OFFENCES.

No.	Art.	Offence.	Punishment.	Tribunal.
150	{456 / 458}	Fraudulent personation	Fourteen years	Either Sup. Ct. Cr. Juris., or Genl. or Quar. Sess.
150a	457	Porsonation at Examination	One year, or $100, fine.	do
151	459	Acknowledging an instrument in false name	Seven years	do
152	462	Counterfeiting, [etc.], current gold or silver coin	Life	do
153	463	Dealing in or importing counterfeit gold and silver coin	Life	do
154	465	Exporting counterfeit coin.	Two years, 2nd offence seven years (1)	do
155	466	Making, buying, or having counterfeiting instruments.	Life	do
156	467	Bringing coining instruments into Canada	Life	do
157	468	Clipping current gold or silver coin	Fourteen years	do
158	469	Defacing current coin and afterwards tendering same	One year, 2nd offence seven years (1)	do
157	470	Possessing clippings of current gold or silver coin	Seven years, 2nd offence fourteen years (1)	do
160	471	Possessing any counterfeit gold or silver coin, with intent to utter same.	Three years, 2nd offence seven years (1)	do
161	471	Possessing three or more counterfeit copper coins	Three years, 2nd offence seven years (1)	do
162	472	Counterfeiting current copper coin, or dealing in same, etc	Three years, 2nd offence seven years (1)	do
163	473	Counterfeiting foreign coins or uttering same, etc.	Three years, 2nd offence seven years (1)	do
164	474	Uttering counterfeit gold or silver coin	Fourteen years, 2nd offence life (1)	do
165	475	Uttering light coins, medals, base copper coins, etc	Three years, 2nd offence seven years (1)	do
166	480	Advertizing conterfeit money, etc	Five years	do
167	482	Arson	Life	do
168	483	Attempt to commit Arson	Fourteen years	do
169	484	Setting fire to crops, etc	Fourteen years	do
170	485	Attempt to fire crops, etc	Seven years	do
171	486	Recklessly setting fire to forest, etc., on crown domain. (2)	Two years	do
172	487	Sending letter threatening to burn buildings, etc.	Ten years	do
173	488	Attempt to damage any building, etc., by explosives	Fourteen yéars	do
174	489	Obstructing a railway in a manner likely to endanger property	Five years	do
175	489	Obstructing a railway *with intent* to endanger property	Life	do

(1) See Art. 478 : and see also comments and authorities at p. 432, *anle*, as to second offences, in general.

(2) This may also be dealt with summarily, and, in that case, punished by fine, ($50), or 6 months imprisonment, (Art. 486, sub. sec. 2).

TABLE OF OFFENCES UNDER TITLE VI.—*Continued.*

INDICTABLE OFFENCES.

No.	Art.	Offence.	Punishment.	Tribunal.
176	490	Obstructing of construction or free use of railway	Two years	Either Sup. Ct. Cr. Juris., or Genl. or Quar. Sess.
177	492	Destroying, damaging, or obstructing telegraphs, telephones, electric lights, fire alarms, etc	Two years	do
178	493	Wrecking	Life	do
179	494	Attempting to wreck	Fourteen years	do
180	495	Wilfully altering removing or concealing marine signals, buoys, etc.	Seven years	do
181	496	Wilfully preventing the saving of a wrecked vessel	Seven years	do
182	496	Wilfully preventing the saving of wreck. (1)	Two years	do
183	497	Injuring rafts, booms, piers, etc	Two years	do
184	498	Mischief to mines	Seven years	do
	499 A	MISCHIEF.		
185	(*a*)	Wilfully damaging a ship, house, etc., *and causing danger to life*	Life	do
186	(*b*)	Wilfully damaging a river or sea bank dyke, etc., *and causing danger of inundation*	Life	do
187	(*c*)	Damaging bridges viaducts, aqueducts, etc., and *rendering same* or highway or railway etc., *dangerous or impassable*	Life	do
188	(*d*)	Damaging railway *with intent to render it impassable*	Life	do
	B			
189	(*a*)	Wilfully damaging a ship in distress, etc	Fourteen years	do
190	(*b*)	Wilfully destroying or injuring cattle by killing maiming, etc	Fourteen years	do
	C			
191	(*a*)	Wilfully damaging ship with intent to render it useless	Seven years	do
192	(*b*)	Wilfully damaging navigation signals, etc	Seven years	do
193	(*c*)	Wilfully damaging a river or sea bank, etc	Seven years	do
194	(*d*) (*e*) (*f*) (*g*)	Wilfully damaging river or canal, private water, etc	Seven years	do
195	(*h*)	Mischief to goods in process of manufacture	Seven years	do
196	(*i*)	Mischief to machinery, etc	Seven years	do
197	(*j*)	Mischief to hop-binds, etc	Seven years	do
	D			
198	(*a*)	Mischief to garden trees, etc	Five years	do
199	(*b*) (*c*) (*d*)	Mischief to post-letter, letter-boxes, post parcels, etc	Five years	do
200	(*e*)	Mischief (by night) to any property worth $20	Five years	do

(1) This is punishable summarily, by fine, ($400), or 6 months imprisonment.

TABLE OF OFFENCES UNDER TITLE VI.—*Continued.*

INDICTABLE OFFENCES.

No.	Art.	Offence.	Punishment.	Tribunal.
201	E (a)	Mischief to any property, worth $20 by day	Two years	Either Sup. Ct. Cr. Juris., or Genl. or Quar. Sess.
201	500	Attempt to maim or kill cattle	Two years	do
202	501	Killing maiming or injuring other animals after another conviction	Fine, (1) or imprisonment, (2) or both	do
203	502	Written threats to injure cattle	Two years	do
204	503	Injuring poll-books, voters' lists and other election documents	Seven years	do
205	504	Injuries to building by tenants	Five years	do
206	505	Injuring Provincial, Municipal, etc., boundary marks	Seven years	do
207	506	Injuries to other land-marks	Five years	do
208	508	Injuring trees to the amount of twenty five cents, after two other convictions	Two years	do
209	509	Injuring vegetable productions in gardens, etc., after another conviction	Two years	do
210	520	Combination in restraint of trade (the offenders being persons)	Fine $4000 or two years	Sup. Ct. of Cr. Juris.
211	520	Combination in restraint of trade (the offender being a corportion)	Fine $10,000	do
212	521	Criminal breaches of contract, by persons (3)	Fine $100 or 3 months	Either Sup. Ct. Cr. Juris., or Genl. or Quar. Sess.
213	521	Criminal breaches of contract by Municipal Corporations, etc	Penalty $1000	do
204	521	Criminal breaches of contract by railway companies	Penalty $100	do
205	523	Intimidation, by violence threats of violence, picketting, etc. (4)	Fine $100 or 3 months	do
206	524	Intimidation by assaults, or violence or threats of violence used in pursuance of unlawful combination	Two years	do
207	525	Intimidation of Wheat Dealers, seamen, etc. (4)	Fine $100 or 3 months	do
210	526	Intimidation of bidders for public lands	Fine $400, or two years; or both	do
211	527	Conspiracies (*not heretinbefore provided for*) to commit indictable offence (5)	Seven years	do
212	528 529	Attempts (*not before provided for*) to commit indictable offence		do

(1) See Art 934, *post*, as to regulation of fine.
(2) See Art. 951, *post*.
(3) This offence may be prosecuted either by indictment or summarily.
(4) These may be dealt with summarily as well as by indictment.
(5) A conspiracy to commit an indictable offence is not triable in a Court of General or Quarter Sessions unless the indictable offence is so triable. (Art. 540, *post*.)

TABLE OF OFFENCES UNDER TITLE VI.—*Continued.*

INDICTABLE OFFENCES.

No.	Art.	Offence.	Punishment.	Tribunal.
113	531, 532	Accessory after the fact to an indictable offence (*in cases not otherwise provided for*).....	(1)	Either Sup. Ct. Cr. Juris., or Genl. or Quar. Sess.

With the exception of Nos. 210, 211, (Combinations in Restraint of Trade), over which the Superior Courts of Criminal Jurisdiction have exclusive jurisdiction, all the indictable offences dealt with in Title VI, and mentioned in the foregoing table, are triable by a court of General or Quarter Sessions, which has, over them, concurrent jurisdiction with the Superior Courts of criminal jurisdiction. See Art. 540, *post*.

Summary Trials.—Under Part LV, *post*, provision is made for the summary trial of certain indictable offences. For instance, it is, by Article 783, provided (amongst other things), that, whenever a person is charged before a Magistrate with having stolen, or obtained by false pretences, or received anything of a value not exceeding ten dollars, the Magistrate may, *with the consent of the accused*, try the accused summarily; and Article 784 provides that in the case of a seafaring person, transiently in Canada, being charged,—within the cities of Quebec or Montreal, or any sea port city or town in Canada,—with the commission of any of the offences mentioned in Article 783, the summary jurisdiction of magistrates shall be absolute; and the same Article, 784, makes the summary jurisdiction of a Stipendiary Magistrate in Prince Edward Island and of a Magistrate in the District of Keewatin, absolute, in respect of all the offences mentioned in Article 783.

In the Province of Ontario, Police Magistrates and Stipendiary Magistrates are empowered by Article 785, *post*, to try summarily, with the accused's consent, any person charged with any offence triable in a Court of General or Quarter Sessions.

By Articles 797, 798 and 799, *post*, it is provided, in reference to summary trials of indictable offences that, "whenever the magistrate finds the offence not proved, he shall dismiss the charge, and make out and deliver, to the person charged, a certificate under his hand stating the fact of such dismissal;" that, "every conviction under this part shall have the same effect as a conviction upon indictment for the same offence," and, that, "every person who obtains a certificate of dismissal, or is convicted under the provisions of this part, shall be released from all further or other criminal proceedings *for the same cause*."

Provisions similar to these are contained in the Imperial Statute, 42-43 Vict., c. 49. (*The Summary Jurisdiction Act* 1879.); and it has been held, in England,

(1) In cases (*not otherwise provided for*) of attempts to commit, or of accessories after the fact to an indictable offence the punishment will be seven years, when the indictable offence itself is punishable by fourteen years or more, (See Articles 528 and 531), or one half of the longest term of imprisonment for the indictable offence itself when such longest term is less than fourteen years (See Articles 529 and 532).

Cases of attempt to commit or of being accessory after the fact to an indictable offence are not triable in a Court of General or Quartor Sessions, unless the offence itself is so triable. (Art. 540, *post*.)

that when a case so summarily dealt with has been dismissed by the Magistrate or Justice, *on its merits*, the defendant has the right, *ex debito justitiæ*, to receive from the Magistrate or Justice, the certificate of dismissal, and that the clause which refers to the making out of the certificate, and which contains the word *forthwith*, means that such certificate is to be made out *forthwith* on the defendant making application for it. (1)

The certificate of dismissal should only be granted, when there has been a full hearing upon the merits. If the certiffcate is granted on a withdrawal of the charge, before hearing, it will be no bar to subsequent proceedings for the same offence. (2)

Fines.—Sureties.—Articles 958, *post*, empowers the Tribunal, in addition to the infliction of punishment, to order security for the convicted offender's future good behaviour, and provides, also, that, on conviction for any offence punishable with imprisonment for five years or less, the offender may be fined, in addition to or in lieu of any punishment otherwise authorized.

Restitution.—Articles 803 and 838, *post*, provide for the restoration of stolen property to the owner after the conviction of the thief or the receiver; or even without a conviction, on satisfactory proof of ownersh p.

Article 836 also provides that, upon the trial of an indictment, the Court may render against the offender, when convicted, a judgment, awarding, to the aggrieved party, compensation to the extent of one thousand dollars for loss of property suffered by means of the offence.

TABLE OF OFFENCES UNDER TITLE VI.

NON-INDICTABLE OFFENCES.

No.	Art.	Offence.	Punishment.	Tribunal.
1	307 } 332 }	Killing Dogs, Birds, etc., with intent to steal the skin, plumage etc.....	Penalty, $20; or 1 month, with h.l.(3)2*nd offence*; 3 months with h. l....	Summary.
2	316	Receiving anything unlawfully obtained the stealing of which is punishable summarily	Same punishment as for stealing it	do
3	333	Killing or taking pigeons.....	Penalty $10 (3).....	do
4	337	Stealing trees, etc., worth 25c at least.	Penalty $25 (3) 2*nd offence*; 3 months; h. l.	do
5	339	Stealing fences gates, etc.....	Penalty $20 (3) 2*nd offence*, 3 months, h. l..	do
6	340	Failing to satisfy Justice of lawful possession of tree, etc...	Penalty $10 (3)	do
7	341	Stealing garden plants, fruit, etc. (4)..	Penalty $20; or 1 month.	do

(1) Hancock v. Somes, 1 E. & E. 795; 28 L. J. (M. C.) 196. See comments at pp. 183 and 184, *ante*.

(2) Reed v. Nutt, 24 Q. B. D. 669.

(3) This is in addition to the value of the animal, bird, or article in question.

(4) This offence, when committed after a previous conviction, is indictable. (See p. 496, *ante*.)

TABLE OF OFFENCES UNDER TITLE VI.—*Continued.*

NON-INDICTABLE OFFENCES.

No.	Art.	Offence.	Punishment.	Tribunal.
8	342	Stealing cultivated roots, etc., in land not being a garden, etc	Penalty $5; or 1 month; b. l. 2*nd offence*; 3 months; h. l.	Summary.
9	352	Stealing or injuring things in Indian Graves	Penalty $100; or 3 months 2*nd offence*: $100 *and* 3 months; h. l.	do
10	381	Secreting wreck, or receiving, or keeping it (1)	Penalty $400; or 6 months	Summary [Two Justices.]
11	382	Buying marine stores from persons under sixteen	Penalty $4, 2*nd offence* $6	Summary.
12	382	Receiving Marine Stores before sunrise or after sunset	Penalty $5, 2*nd offence* $7	do
13	387	Unlawfully possessing public stores of a value not exceeding $25 (2).	Fine, $100; or 6 months	Summary [Two Justices.]
14	388	Not satisfying justices of lawful possession of public stores	Fine $25	do do
15	389	Unlawfully dredging for stores	Fine, $25, or 3 months	do do
16	390	Receiving regimental necessaries (3)	Penalty $40, or 6 months	do do
17	391	Receiving necessaries from Marine or Deserter	Penalty $120, or 6 months	do do
18	392	Receiving a seaman's property by purchase, exchange, or pawn	Penalty $100; 2*nd offence* Penalty $100; or 6 mths	Summary.
19	393	Not satisfying Justice of lawful possession of seaman's property	Fine $25	do
20	442	Printing or using circulars, business cards, etc., in the likeness of bank-notes, etc	Fine $100, or 3 months; or both	Summary [Two Justices.]
21	450	Offences against provisions of Part XXXIII, as to Trade Marks (4)	Four months or $100, fine; 2*nd offence* six months or $250, fine	Summary. do
22	451	Falsely representing goods as manufactured for Her Majesty or any Government	Penalty $100	do
23	452	Unlawfully importing goods liable to forfeiture under Part XXXIII	Penalty $500	do
24	457	Personation at any Qualifying or Competitive Examination (5)	One year. or $100, fine	do
25	464	Manufacturing or importing uncurrent copper coin (6)	Penalty $20 for every pound weight of the coin; and forfeiture	do
26	476	Uttering defaced coin (6)	Penalty $10	Summary [Two Justices.]
27	477	Uttering uncurrent copper coin (6)	Penalty; double the nominal value of the coin, In default 8 days.	Summary.

(1) This offence is also indictable. (See p. 497, *ante*.

(2) When the value is over $25, this offence is indictable (See p. 497, *ante*.)

(3) This is also indictable. (See p. 497, *ante*).

(4) This is also indictable. (See p. 499, *ante*).

(5) This, also is an indictable offence. See p. 500, *ante*).

(6) As to cutting or bending suspected base coin, and as to seizure, and forfeiture, etc., of unlawfully manufactured or imported coin, see secs. 26-31, and 34, R.S.C. 167, set out at pp. 425 and 426, *ante*.

TABLE OF OFFENCES UNDER TITLE VI.—*Continued.*

NON-INDICTABLE OFFENCES.

No.	Art.	Offence.	Punishment.	Tribunal.
28	486	Recklessly setting fire to forest, etc., on crown domain (1)	Fine $50. In default 6 months	Summary.
29	491	Wilfully injuring goods, etc., in railway station, etc, with intent to steal	Penalty $20, (above value of injury); or one month	do
30	495	Fastening any vessel, etc., to a buoy, etc	Penalty $10; or one month.	do
31	496	Preventing saving of wreck (2)	Fine $400; or six months	Summary [Two Justices.]
32	501	Injuries to animals, (not being cattle). (3)	Penalty, $100 : or 3 months	Summary
33	507	Injuries to fences, etc	Penalty $20. (4) 2nd offence, 3 months	do
34	507A	Injuries to Harbour Bars	Penalty $50	do
35	508	Injuries to trees, etc., wheresoever growing (6)	Penalty $25, (5) or 2 months 2nd offence $50, (5) or four months	do
36	509	Injuries to vegetable productions in gardens, etc. (6)	Penalty $20, (5)	do
37	510	Injuries to cultivated roots, etc	Penalty $5, (5) or 1 month, 2nd offence 3 months	do
38	511	Injuries not otherwise provided for	Penalty $20 (5)	do
39	512	Cruelty to animals	Penalty $50 or 3 months or both	Summary [Two Justices.]
40	513	Keeping cockpit	Penalty $50 or 3 months (besides forfeiture)	do do
41	514	Violating provisions as to conveyance of cattle	Penalty $100	Summary.
42	515	Refusing Peace officer admission to cattle car, etc	Penalty $20 or 30 days	do
43	521	Criminal Breaches of contract by persons (7)	Fine $100 or 3 months	Summary [Two Justices.]
44	521	Criminal breach of contract by a municipal corporation, etc (7)	Penalty $1000	do do
45	521	Criminal breach of contract by a Railway Company (7)	Penalty $100	do do
46	522	Municipal corporation or company failing to post up the provisions of Art. 521	Penalty $20 per day	Summary.

(1) This is an Indictable offence ; but may be dealt with by the Magistrate, summarily, when the consequences have not been serious.

(2) This is indictable also.

(3) This offence is indictable when committed after a previous conviction (See p. 502, *ante*.)

(4) This is in addition to the amount of the injury done.

(5) This is in addition to the amount of injury done.

(6) This offence is indictable if committed after two previous convictions and is then punishable by two years imprisonment. (See p. 502, *ante*.)

(7) This may be prosecuted either by indictment or summarily.

TABLE OF OFFENCES UNDER TITLE VI.—*Continued.*

NON-INDICTABLE OFFENCES.

No.	Art.	Offence.	Punishment.	Tribunal.
47	522	Injuring copy provisions, so posted up.	Penalty $10	Summary.
48	523	Intimidation by violence, picketting, etc. (1)	Fine $100 or 3 months .	Summary [Two Justices.]
49	525	Intimidation of wheat dealers, seamen, etc	Fine $100 or 3 months..	do do

See remarks at pp. 503 and 504, *ante*, as to Summary Trials of certain indictable offences, including theft of or obtaining by false pretences or receiving anything of a value not exceeding ten dollars, and also as to Fines, Sureties, and Restitution.

LIMITATION OF TIME FOR PROSECUTING OFFENCES UNDER TITLE VI.

Art. 447 " 448 " 449 " 450 " 451 " 452	Forgery of trade marks and offences relating to the fraudulent marking of merchandise.	Three years. (See Art. 551*a*.)
" 512	Cruelty to animals.	Three months. (See Art. 551*e*.)
" 513	Keeping cockpit.	Three months. (See Art. 551*e*.)
" 514	Violating provisions as to conveyance of cattle.	Three months. (See Art. 551*e*.)
" 515	Refusing Peace officer admission to cattle car, etc.	Three months. (See Art. 551*e*.)

Article 841, *post*, (in all cases not otherwise limited) limits the time, for the commencement of the prosecution of any offence punishable on summary conviction, to six months from the time when the matter of complaint or information arose, except in the North West Territories, where the limitation (in such cases when not otherwise provided for) is *twelve* months

Article 930 prescribes, by two years, all actions suits or informations (not otherwise expressly limited), when the same are for the recovery of the penalties or forfeitures referred to in Article 929, *post*.

See comments and authorities under Art. 551, *post*, as to what is the *commencement of prosecution*.

(1) This may be prosecuted either by indictment or summarily.

TITLE VII.

PROCEDURE.

PART XLI.

GENERAL PROVISIONS.

533. Power to make rules.—Every Superior Court of Criminal Jurisdiction may at any time, with the concurrence of a majority of the judges thereof present at any meeting held for the purpose, make rules of court, not inconsistent with any statute of Canada, which shall apply to all proceedings relating to any prosecution, proceeding or action instituted in relation to any matter of a criminal nature, or resulting from or incidental to any such matter, and in particular for all or any of the purposes following :—

(*a.*) For regulating the sittings of the Court or of any division thereof, or of any judge of the court sitting in Chambers, except in so far as the same are already regulated by law.

(*b.*) For regulating in criminal matters, the pleading, practice and procedure in the court, including the subjects of *mandamus*, *certiorari*, *habeas corpus*, prohibition, *quo warranto*, bail and costs, and the proceedings under section nine hundred of this Act.

(*c.*) Generally for regulating the duties of the officers of the Court and every other matter deemed expedient for better attaining the ends of justice and carrying the provisions of the law into effect.

2. Copies of all rules made under the authority of this section shall be laid before both Houses of Parliamant at the session next after the making thereof, and shall also be published in the *Canada Gazette*. 52 V., c. 40.

534. Civil remedy not suspended.—After the commencement of this Act no civil remedy for any act or omission shall be suspended or affected by reason that such act or omission amounts to a criminal offence.

Before the enactment of the present Code, there were various statutes expressly declaring that, in connection with certain specified offences, a person's civil remedy should not be lessened or affected.

By the above Article the same principle is extended to all offences; and all doubt is thereby removed from a question which was not altogether free from uncertainty. For, although, in regard to section 430 of the English Draft Code, (which is identical with our Article 534), the Royal Commissioners say, that it "seems to be the existing law, as laid down in Wells v. Abrahams, and Osborn v. Gillett," (1), there are cases in which the law does not appear to have been so laid down, but in which it has been held that a person who suffered from a felony could not maintain his civil action against the felon, before discharging himself of his duty to the public, by prosecuting the felon for the public wrong, and that, when, in a civil suit, the facts amounted to felony, the case must be stopped or be suspended, in order that public justice might be first vindicated by the prosecution of the offender; and, especially so, in cases where a felony was disclosed on the face of the plaintiff's declaration. (2) "The policy of the law" said Lord Ellenborough, C. J., "requires that before the party injured by any felonious act can seek civil redress for it, the matter should be heard and disposed of before the proper criminal tribunal, in order that the justice of the country may be first satisfied in respect of the public offence." (3)

In the case of Wells v. Abrahams which was tried at the Liverpool Spring Assizes, 1872, before *Lush*, J., the action was one of *trespass* and *trover*, to which the defendant pleaded *not guilty* and *not possesssd*; and the proof shewed that in the course of negociations for a loan from the defendant, upon security of some jewellery, the plaintiff's wife took, to the defendant's place of business, a packet containing, (among other jewellery), a gold brooch, valued at £150, and left it with the defendant; that, the parties not having come to terms, the defendant, afterwards, returned the packet to the plaintiff's wife, who, on opening it a few days afterwards, discovered that the brooch was not in it; upon which she wrote to the defendant charging him with having abstracted the brooch. The defendant, who was examined as a witness on his own behalf, denied having abstracted the brooch; and both he and his son swore that it was in the packet when it was returned to the plaintiff's wife. The jury rendered a verdict in favor of the plaintiff for £150; and the defendant, moved for a new trial, on the ground that, if the evidence established anything against him, it was a larceny, for which he had not been prosecuted. The English Court of Queen's Bench (Cockburn, C. J., Blackburn, J. Lush, J., and Quain, J.,) rejected the motion; and the opinion expressed was, that, although it had been long established as the law of England that where an injury amounted to an infringement of the civil rights of an individual and at the same time to a felony, the redress by civil action was suspended until the party inflicting the injury was prosecuted the question of enforcing this rule was a difficult one dependent upon the facts of a particular case; that a judge at *nisi prius* could only try the record sent down to him; that if matter of this sort was not pleaded, (and there was nothing of the sort pleaded in this case), he could neither nonsuit the plaintiff nor direct a verdict for the defendant; that moreover, a defendant could not set up his own felony as a defence: (4) and, that, therefore, unless the plaintiff alleged the felony, or the Court itself interposed to *postpone* the trial, as it might, there seemed to be no way in which such a matter could be made available as a defence.

Article 534 now makes it *certain* that no such defence can be made available.

535. Distinction between felony and misdemeanor abolished.— After the commencement of this Act the distinction between felony and misdemeanor shall be abolished, and proceedings in respect of all

(1) Wells v. Abrahams, L. R., 7 Q. B., 554; Osborn v. Gillett, L R, 8 Ex. 88.
(2) Bulloek v. Dodds, 2 B. & Ald. 258; Wel'ock v. Constantine, 2 H. & C. 146; Gimson v. Woodfull, 2 C. & P. 41; Ashby v. White, 1. Sm. L. C., 6 Ed. 255, 267. Pease v. McAloon, 1 Kerr, 111, Prosser v Rowe, 2 C. & P. 421; Walsh v. Nattrass, 19 U. C. C. P. 453; Williams v. Robinson, 20 U. C. C. P. 255; Livingstone v. Massey, 23 U. C. Q. B. 155; White v. Spettigue 13 M. & W. 603.
(3) Crosby v. Leng, 12 East, 413.
(4) Luttrell v. Reynell. 1 Mod. 282.

indictable offences (except so far as they are herein varied) shall be conducted in the same manner.

With reference to this subject, the English Commissioners have the following remarks.

"The distinction between felony and misdemeanor was, in early times, nearly, though not absolutely, identical with the distinction between crimes punishable with death and crimes not so punishable.

For a long time past, this has ceased to be the case. Most felonies are no longer punishable with death; and many misdemeanors are now punishable more severely than many felonies.

The great changes which have taken place in our criminal law have made the distinction nearly if not altogether unmeaning.

It is impossible to say on what principle embezzlement should be a felony, and the fraudulent appropriation of money by an agent, or the obtaining of goods by false pretences a misdemeanor: why bigamy should be a felony, and perjury a misdemeanor; why child stealing should be a felony, and abduction a misdemeanor.

The result of this arbitrary classification is that the right to be bailed, the liability to be arrested without warrant, and (to a certain extent) the right of the Court to order the payment of costs of prosecutions, vary in a manner equally arbitrary and unreasonable.

Moreover, the old distinction still regulates the question whether a person accused of an offence should be entitled or not to be bailed as of right, (1) and should be liable or not to summary arrest; (2) and it also regulates the mode of trial, including the right of peremptory challenge.

The jury in a case of felony, however trifling it may be must be kept together till they give their verdict; in cases of misdemeanor, however serious, they may be allowed to separate.

As regards the right of challenging jurors we propose that the number of challenges to be allowed shall be proportioned to the possible severity of the punishment which might follow on conviction. (3). We have also provided for the jury being allowed to separate during the trial of all but capital cases." (4)

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.

(1) See, as to bail, Articles 601-604, *post*.
(2) As to arrest without warrant, see Article 552, *post*.
(3) See as to peremptory challenges, Article, 668, *post*.
(4) See Article 673, *post*.

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.

538. Superior Court.—Every Superior Court of Criminal Jurisdiction and every judge of such court sitting as a court for the trial of criminal causes, and every Court of Oyer and Terminer and General Gaol Delivery has power to try any indictable offence.

"The expression 'Superior Court of Criminal Jurisdiction' means and includes the following Courts:

(i.) In the province of Ontario, the three divisions of the High Court of Justice;

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

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

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

(v.) In the province of Manitoba, the Court of Queen's Bench (Crown side)." (Art. 3 *y*.)

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.

540. Cases within the exclusive jurisdiction of Superior Courts of Criminal Jurisdiction.—No such court as mentioned in the next

preceding section has power to try any offence under the following sections, that is to say :

PART IV.—Sections sixty-five, TREASON ; sixty-seven, ACCESSORIES AFTER THE FACT TO TREASON ; sixty-eight, sixty-nine and seventy, TREASONABLE OFFENCES ; seventy-one, ASSAULT ON THE QUEEN ; seventy-two, INCITING TO MUTINY ; seventy-seven, UNLAWFULLY OBTAINING AND COMMUNICATING OFFICIAL INFORMATION ; seventy-eight, COMMUNICATING INFORMATION ACQUIRED BY HOLDING OFFICE.

PART VII.—Sections one hundred and twenty, ADMINISTERING, TAKING OR PROCURING THE TAKING OF OATHS TO COMMIT CERTAIN CRIMES ; one hundred and twenty-one, ADMINISTERING, TAKING OR PROCURING THE TAKING OF OTHER UNLAWFUL OATHS ; one hundred and twenty-four, SEDITIOUS OFFENCES ; one hundred and twenty-five, LIBELS ON FOREIGN SOVEREIGNS ; one hundred and twenty-six, SPREADING FALSE NEWS.

PART VIII.—PIRACY ; any of the sections in this part.

PART IX.—Sections one hundred and thirty-one, JUDICIAL CORRUPTION ; one hundred and thirty-two, CORRUPTION OF OFFICERS EMPLOYED IN PROSECUTING OFFENDERS ; one hundred and thirty-three, FRAUDS UPON THE GOVERNMENT ; one hundred and thirty-five, BREACH OF TRUST BY A PUBLIC OFFICER ; one hundred and thirty-six, CORRUPT PRACTICES IN MUNICIPAL AFFAIRS ; one hundred and thirty-seven (*a.*), SELLING AND PURCHASING OFFICES.

PART XI.—ESCAPES AND RESCUES ; any of the sections in this part.

PART XVIII.—Sections two hundred and thirty-one, MURDER ; two hundred and thirty-two, ATTEMPTS TO MURDER ; two hundred and thirty-three, THREATS TO MURDER ; two hundred and thirty-four, CONSPIRACY TO MURDER ; two hundred and thirty-five, ACCESSORY AFTER THE FACT TO MURDER.

PART XXI.—Sections two hundred and sixty-seven, RAPE ; two hundred add sixty-eight, ATTEMPT TO COMMIT RAPE.

PART XXIII.—DEFAMATORY LIBEL ; any of the sections in this part.

PART XXXIX.—Section five hundred and twenty, COMBINATIONS IN RESTRAINT OF TRADE.

PART XL.—CONSPIRING OR ATTEMPTING TO COMMIT, OR BEING ACCESSORY AFTER THE FACT to any of the foregoing offences.

See Tables of offences under Titles II, III, IV, V and VI, at pp. 77, 99, 133, 263, and 506, *ante*, respectively

541. Exercising the powers of two justices.—The judge of the Sessions of the Peace for the city of Quebec, the judge of the Sessions of the Peace for the city of Montreal, and every recorder, police

magistrate, district magistrate or stipendiary magistrate appointed for any territorial division, and every magistrate authorized by the law of the province in which he acts to perform acts usually required to be done by two or more justices of the peace, may do alone whatever is authorized by this Act to be done by any two or more justices of the peace, and the several forms in this Act contained may be varied so far as necessary to render them applicable to such case. R.S.C., c. 174, s. 7.

PART XLIII.

PROCEDURE IN PARTICULAR CASES.

542. Prosecutions requiring consent of Governor-General.—Proceedings for the trial and punishment of a person who is not a subject of Her Majesty, and who is charged with any offence commited within the jurisdiction of the Admiralty of England shall not be instituted in any court in Canada except with the leave of the Governor General and on his certificate that it is expedient that such proceedings should be instituted.

It is said, that, "the Criminal law of Canada extends to all offences committed by any person in Canada, or on such part of the sea adjacent to the coast of Canada as is within one marine league from ordinary low-water mark, or *is deemed by International law to be within the territorial sovereignty of Her Majesty*, or committed by any person on board any British ship or boat on the great lakes, or on the high seas, or in any place where the Admiralty of England has jurisdiction, and to piracy by the Law of Nations wherever committed" (1)

An Article to this effect was contained in the Code, when it was first introduced; but, in committee, it provoked a lengthy discussion, particularly as to the meaning and effect of the words, "*deemed by International law to be within the territorial sovereignty of Her Majesty*"; and the section was ultimately allowed to drop, although considered by Sir John Thompson to be a correct statement of the law. (2)

The above Article, 542, is based upon the Imperial Statute, 41 & 42 Vict. c. 73. (*The Territorial Waters Jurisdiction Act.* 1878.)

Section 2 of that Act declares, that, "an offence committed by a person,—*whether he is or is not a subject of Her Majesty*,—on the open sea, within the territorial waters of Her Majesty's dominions, is an offence within the jurisdiction of the Admiral, although it may be committed on board or by means of a foreign ship; and the person who commits such offence may be arrested tried and punished accordingly." And section 3 provides, that, "proceedings for the trial and punishment of a person who is not a subject of Her Majesty, and who is charged with any such offence as is declared by this Act to be within the jurisdiction of the Admiral, shall not be instituted * * * * * * in any of the dominions of Her Majesty, out of the United Kingdom, except with the leave of the Governor of the part of the dominions in which such proceedings are proposed to be instituted, and on his certificate that it is expedient that such

(1) Burb. Dig. Cr. L. 9.
(2) See Debates, in Extra Appendix, *post*.

proceedings should be instituted." By section 4. it is also enacted that, "on the trial of any person who is not a subject of Her Majesty for an offence declared by this Act to be within the jurisdiction of the Admiral, it shall not be necessary to aver, in any indictment on such trial, that such consent or certificate of the * * * Governor, as is required by this Act, has been given; and the fact of the same having been given shall be presumed, unless disputed by the defendant at the trial; and the production of a document purporting to be signed by * * * the Governor, and containing such consent and certificate shall be sufficient evidence, for all the purposes of this Act, of the consent or certificate required by this Act."

Section 7 of the same Act defines *the territorial waters of Her Majesty* as being "such part of the sea adjacent to the coast of the United Kingdom, or the coast of some other part of Her Majesty's dominions, as is deemed, by International law, to be within the territorial sovereignty of Her Majesty," and declares, that, "for the purposes of any offence declared by this Act to be within the jurisdiction of the Admiral, any part of the open sea within one marine league of the coast, measured from low-water mark, shall be deemed to be open sea within the territorial waters of Her Majesty's dominions."

Section 18 of the Imperial statute, 52 & 53 Vict., c. 63 (*The Interpretation Act*, 1889), declares that, the expression "Governor shall, as respects Canada, and India, mean the Governor-General, and include any person who, for the time being, has the powers of the Governor-General."

A foreigner who commits a criminal offence against another foreigner, or against a British subject, on board a foreign ship, on the high seas, outside of the territorial waters of Her Majesty, is not triable in any part of Her Majesty's Dominions. (1) This was held even in the case of a ship which (though foreign built) carried the British flag The prisoner was one of the crew of a ship built in Holstein whence she sailed to London, England. All the officers and crew were foreigners. The registered sole owner, one R., was an alien born, though described in the register as "of London, Merchant." The ship sailed on a voyage from London, under the British flag. While on the voyage, the prisoner killed the master, on board the vessel, when several thousand miles from England, and 200 miles from land. On the trial of the prisoner for murder, these facts were proved; and no evidence was given that R., the owner of the ship, had been naturalized, or had obtained letters of denization. Under these circumstances, it was held that there was no evidence that the ship was British, and that consequently the prisoner could not be convicted for the offence, in England. (2)

Formerly Her Majesty's Courts had no jurisdiction over an offence committed by a foreigner on board of a foreign ship even if at the time of the crime being committed the ship was within the territorial waters of Her Majesty's dominions. The question came up in the case of R. v. Keyn; in which the prisoner was a foreigner in command of a foreign ship, and while passing *within three miles* of the shore of England, on a voyage to a foreign port, his ship ran into a British ship, and sank her, whereby a passenger on board the British ship was drowned. The facts of the case were such as, apart from the question of jurisdiction, amounted to manslaughter, by English law. It was held, that the offence was not committed on board the British ship, and that there was no jurisdiction in the Courts of England to try the prisoner, a foreigner passing the English coast, on the high seas, in a foreign ship, though the occurence took place within three miles of the English coast. (3)

It was the decision in Keyn's case that led to the passing of the *Territorial Waters Jurisdiction Act*, 1878, amending the law, as already shewn, so that a foreigner on board a foreign ship may be tried by the Courts of England or of

(1) R. v. Lewis, Dears & B. 182; 26 L. J. (M. C.) 104; R. v. De Mattos, 7 C. & P. 458; R. v. Kohn, 4 F. & F. 68; R. v. Depardo, 1 Taunt, 26; R. & R. 134.
(2) R. v. Bjornsen, L. & C. 545; 34 L. J. (M. C.) 180.
(3) R. v. Keyn, L. R. 2 Ex. D. 63; 46 L. J. (M. C.) 17.

any of Her Majesty's Dominions for an offence committed on the open sea, provided the occurence takes place within the territorial waters of Her Majesty's dominions. and subject to the consent, as to the United Kingdom, of one of Her Majesty's Principal Secretaries of State, or, in cases arising in any part of Her Majesty's dominions outside of the United Kingdom,—with the consent of the Governor of that part.

The jurisdiction of the Admiralty extends over *British* ships not only on the high seas, but also in foreign rivers, below the bridges, where the tide ebbs and flows and where great ships go, although the municipal authorities of the foreign country may be entitled to concurrent jurisdiction. (1) So that a person whether a British subject or a foreigner who is on board a British ship on the high seas or in foreign rivers below the bridges, where the tide ebbs and flows, and where great ships go, is subject to the laws of England the same as if he were on British soil, such a ship being in law part of the territory of the United Kingdom. (2)

Thus, where a foreigner was convicted, in England, of manslaughter committed on board a British ship in the river *Garonne*, in France, about 35 miles from the sea, and about 300 yards from the nearest shore, within the ebb and flow of the tide, the conviction was upheld. (3)

So, also, where a person committed a larceny on board a British ship lying afloat in the open river at Rotterdam, moored to the quay in a place where large vessels usually lay, and 16 or 18 miles from the sea, between which and the ship there were no bridges, and within the ebb and flow of the tide, it was held that the larceny took place within the jurisdiction of the Admiralty, and therefore that a person who afterwards, in England, received the property so stolen could be tried at the Central Criminal Court, as the thief himself, even if he had been a foreigner, not one of the crew, might have been so tried. (4)

Upon an indictment for larceny out of a vessel lying in a river at Wampu, in China, the prosecutor gave no evidence as to the tide flowing; but the judges held that the Admiralty had jurisdiction, it being a place where great ships go.(5)

It has been held that the liability of the defendant, when he is a foreigner, is not affected by the fact that he was, in the first instance, brought illegally and by force on board the ship, unless the offence committed by him was one committed merely for the purpose of freeing himself from such unlawful restraint. Therefore, where the defendant, a foreigner, having committed a crime in England had fled to Hamburg, and was there arrested and forced on board an English ship, and while he was kept in custody on board such ship, on the high seas, killed the officer who had arrested him, not for the purpose of escaping, but of malice prepense, it was held that even assuming such arrest and detention to be illegal, he was guilty of murder. (6)

Where, on a trial for maliciously wounding, on the high seas, it was stated by three witnesses that the vessel on board of which the offence was alleged to have been committed was a British ship of Shields, sailing under the British flag, but no proof was given of the ownership or registration of the vessel, it was held that the Court had jurisdiction, as the evidence shewed that the vessel was British, and, that, that being so, the Court would have jurisdiction, even if there had been positive proof that the vessel was not registered. (7)

By section 267 of the Merchant Shipping Act, 17 and 18 Victoria, chapter 104, (Imp.), all offences against property or person committed in or at any place either ashore or afloat out of Her Majesty's dominions, by any master, seaman, or

(1) R. v. Anderson, L. R. 1 C. C. R. 161; 38 L. J. (M. C.) 12.
(2) R. v. Lopez, R. v. Sattler, Dears & B. 525; 27 L. J. M. C. 48; R. v. Lesley, Bell, 220; 29 L. J. (M. C.) 97.
(3) R. v. Anderson, *supra*.
(4) R. v. Carr, 10 Q. B D. 76; 52 L. J. (M. C.) 12.
(5) R. v. Allen, 1 Mood C. C. 494.
(6) R. v. Sattler, *supra*,
(7) R. v. Seberg, L. R. 1 C. C. R. 264; R. v. Von Seberg, 39 L.J. (M.C.) 133, S. C.

apprentice, who at the time when the offence is committed is, or, within three months previously, has been employed in any British ship, shall be deemed to be offences of the same nature respectively and be liable to the same punishments respectively, and be enquired of, heard, tried, determined, and adjudged in the same manner and by the same courts, and in the same places as if such offences had been committed within the jurisdiction of the Admiralty of England. (1)

A hulk retaining the general appointments of a ship, registered as a British ship and hoisting the British ensign, although only used as a floating warehouse is a British ship within the meaning of the above enactment. (2)

It is also enacted by section 21 of the 18 & 19 Vict. c. 91, that if any person being a British subject charged with having committed any crime or offence on board any British ship on the high seas, or in any foreign port, or harbor, or if any person not being a British subject charged with having committed any crime or offence on board any British ship on the high seas is *found*, (that is to say, is found to be at the time of his trial), (3) within the jurisdiction of any court of justice in Her Majesty's dominions, which would have had cognizance of such crime or offence if committed within the limits of its ordinary jurisdiction such court shall have jurisdiction to hear and try the case as if such crime or offence had been committed within such limits.

By section 11 of the 30 & 31 Vict. c. 124, if a British subject commits a crime on board a British ship or on board a foreign ship to which he does not belong, any Court in the Queen's dominions, which would have cognizance of such crime if committed on board a British ship within the limits of the ordinary jurisdiction of such Court, shall have jurisdiction to hear and determine the case, as if the said crime had been committed as last aforesaid. (4)

Under section 9 of 24 & 25 Vict. c. 100, a British subject who, in a foreign country, within the dominion of a foreign power, murders a British subject or a foreigner, is triable in England. This, in fact, was the state of the law before the passing of 24 & 25 Vict. c. 100. (5)

We have already seen that, according to a recent decision of the Privy Council, the legislative powers of a colonial legislature are confined to its own territory, and that it cannot legislate for offences committed beyond the limits of the colony. (6)

PROSECUTIONS REQUIRING CONSENT OF ATTORNEY GENERAL.

543. Obtaining or communicating official information.—No person shall be prosecuted for the offence of unlawfully obtaining and communicating official information, as defined in sections seventy-seven and seventy-eight, without the consent of the Attorney-General or of the Attorney General of Canada. 53 V., c. 10, s. 4.

544. Judicial corruption.—No one holding any judicial office shall be prosecuted for the offence of judicial corruption, as defined in section one hundred and thirty-one, without the leave of the Attorney-General of Canada.

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(1) R. v. Dudley, 11 Q. B. D. 273; 54 L. J. (M. C.) 32.
(2) R. v. Armstrong, 13 Cox, 184, Archibald, J.
(3) R. v. Lopez, Dears & B. 525; 27 L. J. (M. C.) 48.
(4) See Arch. Cr. Pl. & Ev. 21 Ed. p. 36.
(5) See R. v. Azzopardi, 2 Mood. C. C. 288; 1 C. & K. 203: R. v. Sawyer, R. & R. 294.
(6) See McLeod v. Atty Gen. N. S. Wales, (L. N. 402-405), cited in full, with comments at pp. 211-213, *ante*,

545. Making or having explosives.—If any person is charged before a justice of the peace with the offence of making or having explosive substances, as defined in section one hundred, no further 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. R.S.C., c. 150, s. 5.

PROSECUTIONS REQUIRING CONSENT OF MINISTER OF MARINE AND FISHERIES.

546. Sending or taking an unseaworthy ship to sea.— No person shall be prosecuted for any offence under section two hundred and fifty-six or two hundred and fifty-seven, without the consent of the Minister of Marine and Fisheries.

OTHER PROSECUTIONS REQUIRING THE ATTORNEY GENERAL'S CONSENT.

547. Criminal Breach of Trust.—No proceeding or prosecution against a trustee for a criminal breach of trust, as defined in section three hundred and sixty-three, shall be commenced without the sanction of the Attorney-General. R.S.C., c. 164, s. 65.

548. Concealing encumbrances.—No prosecution for concealing deeds and encumbrances, as defined in section three hundred and seventy, shall be commenced without the consent of the Attorney-General, given after previous notice to the person intended to be prosecuted of the application to the Attorney-General for leave to prosecute. R.S.C., c. 164, s. 91.

549. Uttering defaced coin.—No proceeding or prosecution for the offence of uttering defaced coin, as defined in section four hundred and seventy-six, shall be taken without the consent of the Attorney-General.

For meaning of "Attorney-General," see Article 3 *ante*, p. 2.

It will be seen, by Article 613 (*h*) *post*, that it is not necessary to state in the indictment that the consent referred to in the above Articles has been obtained.

550. Trials of persons under sixteen.—The trials of all persons apparently under the age of sixteen years shall, so far as it appears expedient and practicable, take place without publicity, and separately and apart from that of other accused persons and at suitable times to be designated and appointed for that purpose

551. Limitations of time for commencing certain prosecutions.—No prosecution for an offence against this Act, or action for penalties or forfeiture, shall be commenced—

(*a.*) after the expiration of THREE YEARS from the time of its commission, if such-offence be—

(i.) TREASON, except treason by killing Her Majesty or where the overt act alleged is an attempt to injure the person of Her Majesty (Part IV., section sixty-five) ;

(ii.) TREASONABLE OFFENCES (Part IV., section sixty-nine) ;

(iii.) any offence against Part XXXIII., relating to the FRAUDULENT MARKING OF MERCHANDISE ; nor

(*b.*) after the expiration of TWO YEARS from its commission, if such offence be—

(i.) A FRAUD UPON THE GOVERNMENT (Part IX., section, one hundred and thirty-three) ;

(ii.) A CORRUPT PRACTICE in municipal affairs (Part IX., section one hundred and thirty-six) ;

(iii.) UNLAWFULLY SOLEMNIZING MARRIAGE (Part XXII., section two hundred and seventy-nine ; nor

(*c.*) after the expiration of ONE YEAR from its commission, if such offence be—

(i.) OPPOSING READING OF RIOT ACT and assembling after proclamation (Part V., section eighty-three) ;

(ii.) REFUSING TO DELIVER WEAPON TO JUSTICE (Part VI., section one hundred and thirteen) ;

(iii.) COMING ARMED NEAR PUBLIC MEETING (section one hundred and fourteen) ;

(iv,) LYING IN WAIT NEAR PUBLIC MEETING (section one hundred and fifteen) ;

(v.) SEDUCTION of girl under sixteen (Part XIII., section one hundred and eighty-one) ;

(vi.) SEDUCTION under promise of marriage (section one hundred and eighty-two) ;

(vii.) SEDUCTION of a ward, &c. (section one hundred and eighty-three) ;

(viii.) UNLAWFULLY DEFILING WOMEN (section one hundred and eighty-five) ;

(ix.) PARENT OR GUARDIAN PROCURING DEFILEMENT OF GIRL (section one hundred and eighty-six) ;

(x.) HOUSEHOLDERS PERMITTING DEFILEMENT OF GIRLS ON THEIR PREMISES (section one hundred and eighty-seven) ; nor

(*d.*) after the expiration of SIX MONTHS from its commission, if the offence be —

(i.) UNLAWFUL DRILLING (Part V., section eighty-seven) ;

(ii.) BEING UNLAWFULLY DRILLED (section eighty-eight) ;

(iii.) HAVING POSSESSION OF ARMS for purposes dangerous to the public peace (Part VI., section one hundred and two) ;

(iv.) PROPRIETOR OF NEWSPAPER PUBLISHING advertisement offering REWARD for recovery of stolen property (Part X., section one hundred and fifty-seven, paragraph *d*) ; nor

(*e.*) after the expiration of THREE MONTHS from its commission if the offence be cruelty to animals under sections five hundred and twelve and five hundred and thirteen, Part XXXVIII ; nor

(ii.) RAILWAYS VIOLATING PROVISIONS relating to conveyance of cattle (Part XXXIX., section five hundred and fourteen) ;

(iii.) REFUSING PEACE OFFICER ADMISSION TO CAR, &c. (section five hundred and fifteen) ;

(*f.*) after the expiration of ONE MONTH from its commission, if the offence be—

(i.) improper use of OFFENSIVE WEAPONS (Part VI., sections one hundred and three, and one hundred and five to one hundred and eleven inclusive).

2. No person shall be prosecuted, under the provisions of section sixty-five or section sixty-nine of this Act, for any OVERT ACT OF TREASON expressed or declared by open and advised speaking, unless information of such overt act, and of the words by which the same was expressed or declared, is given upon oath to a justice within **six days** after the words are spoken, and a warrant for the apprehension of the offender is issued within **ten days** after such information is given.

Under the common law there is no limited time for the prosecution of proceedings at the suit of the Crown; and, therefore, the proceedings in all criminal cases, in relation to which the time is not limited by statute, may be prosecuted at any length of time after the commission of the offence.

As the limitations of time fixed by the above Article, 551, relate to the commencement of the prosecution, the question arises, what is the commencement of a criminal prosecution?

In a case based upon the repealed statutes relating to coin, it was held that the information and proceedings before the Magistrate, *upon the defendant being taken*, was to be deemed the "commencement of the prosecution" within the meaning of those Acts. (1)

In another case, where the warrant of commitment for the offence was within the time limited, but the indictment not till afterwards, it was held sufficient. (2)

The mere *issuing* of a warrant to apprehend the defendant, in a case under the 9 Geo. 4, c. 69, sec 4, was held not to be a commencement of the prosecution ; (3) but that it was necessary to shew, in addition to the *issuing* of the warrant, that it was *executed* within the time limited for the commencement of the prosecution. (4)

Proof of a *warrant* to apprehend the defendant was held not to be evidence of the commencement of a prosecution within the time limited by the 9 Geo. 4, c. 69, s. 4, although the warrant was issued within the twelve months prescribed by that section and although it recited the laying of the information, but that the information itself should have been given in evidence. (5)

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(1) R. v. Willace, 1 East, P. C. 186. See, also, R. v. Brooks, 1 Den. 217; 2 C. & K. 402

(2) R. v. Austin, 1 C. & K. 621.

(3) R. v. Hull, 2. F. & F. 16.

(4) R. v. Casbolt, 11 Cox, 385, 386.

(5) R. v. Parker, L. & C. 459; 33 L. J. (M. C.) 135.

Verbal proof that a prisoner, charged with a treasonable offence respecting the coin, was apprehended, within three months after the offence was committed, was held to be insufficient, where the indictment was after the three months, and the warrant to apprehend or to commit was not produced. (1)

Where the prisoner was indicted in 1869 for night poaching alleged to have been committed in 1863, and pleaded guilty, he was allowed to withdraw his plea, and plead not guilty, and no information and warrant being produced shewing that the prosecution had been commenced within twelve calendar months as directed by 9 Geo. 4. c. 69, sec 4, Byles, J., directed an acquittal. (2)

The time limited for the commencement of a criminal prosecution begins to run as soon as the act which constitutes the offence has taken place. For instance, it was held in an American case that the crime of embezzlement was committed, and the statute of limitations of the State of Indiana, relating to that offence, began to run when the defendant, as treasurer of a county failed to pay over the county's money in his hands to his successor in office, and that the mere fact of a subsequent demand and refusal did not take the case out of the operation of the statute. (3)

A defence based upon the provisions of Article 551, as to the limitation of the prosecution need not be specially pleaded, but may, under the terms of Article 631, *post*, be relied on under the plea of not guilty.

In a decision recently rendered by the Supreme Court of Kansas, it was held that the failure of a defective indictment or information, and the presentation of a new and correct indictment or information after the statute of limitations has begun to run, does not revive the statute; but that the statute is put aside by the presentation and filing of an indictment against a defendant, and remains silent until the legal proceedings thereon are terminated; and that if a defective indictment is withdrawn by means of a *nolle prosequi*, or dismissed with consent of the court, and an information is filed charging the defendant with the same offence, the information continues the legal proceedings which were commenced by the presentation and filing of the original indictment. (4)

In an English case, an indictment for night poaching preferred against the defendant, within twelve months after the commission of the offence, was ignored. Four years afterwards another bill was laid and found against him, for the same offence, and, upon an objection that the proceeding was out of time, Coleridge. J., doubting whether the first indictment was not a proceeding sufficient to entitle the prosecutor to proceed, reserved the point; but the defendant was acquitted by the jury, on the merits. (5)

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 sixty-five, treason; sixty-seven, accessories after the fact to treason; sixty-eight, sixty-nine and seventy, treasonable offences; seventy-one, assaults on the Queen; seventy-two, inciting to mutiny.

PART V.—Sections eighty-three, offences respecting the reading of the Riot Act; eighty-five, riotous destruction of buildings; eighty-six, riotous damage to buildings.

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(1) R. v. Philips, R. & R. 369.
(2) R. v. Casbolt, *supra*. See, also, Tilladam v. Inhabitants of Bristol. 4 N. & M., 144; 2 A. & E. 389; 4 L. J. M. C. 35.
(3) State v. Mason, (Ind. Supr Ct.), 8 N. East Rep. 716.
(4) State v. Child, 24 Pac. Rep. 952.
(5) R. v. Killminster, 7 C & P. 228.

PART VII.—Sections one hundred and twenty, administering, taking or procuring the taking of oaths to commit certain crimes; one hundred and twenty-one, administering, taking or procuring the taking of other unlawful oaths.

PART VIII.—Sections one hundred and twenty-seven, piracy; one hundred and twenty-eight, piratical acts; one hundred and twenty-nine, piracy with violence.

PART XI.—Sections one hundred and fifty-nine, being at large while under sentence of imprisonment; one hundred and sixty-one, breaking prison; one hundred and sixty-three, escape from custody or from prison; one hundred and sixty-four, escape from lawful custody.

PART XIII.—Section one hundred and seventy-four, unnatural offence.

PART XVIII.—Sections two hundred and thirty-one, murder; two hundred and thirty-two, attempt to murder; two hundred and thirty-five, being accessory after the fact to murder; two hundred and thirty-six, manslaughter; two hundred and thirty-eight, attempt to commit suicide.

PART XIX.—Sections two hundred and forty-one, wounding with intent to do bodily harm; two hundred and forty-two, wounding; two hundred and forty-four, stupefying in order to commit an indictable offence; two hundred and forty-seven and two hundred and forty-eight, injuring or attempting to injure by explosive substances; two hundred and fifty, intentionally endangering persons on railways; two hundred and fifty-one, wantonly endangering persons on railways; two hundred and fifty-four, preventing escape from wreck.

PART XXI.—Sections two hundred and sixty-seven, rape; two hundred and sixty-eight, attempt to commit rape; two hundred and sixty-nine, defiling children under fourteen.

PART XXII.—Section two hundred and eighty-one, abduction of a woman.

PART XXV.—Section three hundred and fourteen, receiving property dishonestly obtained.

PART XXVI.—Sections three hundred and twenty, theft by agent, &c.; three hundred and fifty-five, bringing into Canada things stolen.

PART XXIX.—Sections three hundred and ninety-eight, aggravated robbery; three hundred and ninety-nine, robbery; four hundred, assault with intent to rob; four hundred and one, stopping the mail; four hundred and two, compelling execution of documents by force; four hundred and three, sending letter demanding with

menaces ; four hundred and four, demanding with intent to steal ; four hundred and five, extortion by certain threats.

PART XXX.—Sections four hundred and eight, breaking place of worship and committing an indictable offence ; four hundred and nine, breaking place of worship with intent to commit an indictable offence ; four hundred and ten, burglary ; four hundred and eleven, housebreaking and committing an indictable offence ; four hundred and twelve, housebreaking with intent to commit an indictable offence ; four hundred and thirteen, breaking shop and committing an indictable offence ; four hundred and fourteen, breaking shop with intent to commit an indictable offence ; four hundred and fifteen, being found in a dwelling-house by night ; four hundred and sixteen, being armed, with intent to break a dwelling-house ; four hundred and seventeen, being disguised or in possession of housebreaking instruments.

PART XXXI.—Sections four hundred and twenty-three, forgery ; four hundred and twenty-four, uttering forged documents ; four hundred and twenty-five, counterfeiting seals ; four hundred and thirty, possessing forged bank notes ; four hundred and thirty-two, using probate obtained by forgery or perjury.

PART XXXII.—Sections four hundred and thirty-four, making, having or using instrument for forgery or uttering forged bond or undertaking ; four hundred and thirty-five, counterfeiting stamps ; four hundred and thirty-six, falsifying registers.

PART XXXIV.—Section four hundred and fifty-eight, personation of certain persons.

PART XXXV.—Sections four hundred and sixty-two, counterfeiting gold and silver coin ; four hundred and sixty-six, making instruments for coining ; four hundred and sixty-eight, clipping current coin ; four hundred and seventy, possessing clipping of current coin ; four hundred and seventy-two, counterfeiting copper coin ; four hundred and seventy-three, counterfeiting foreign gold and silver coin ; four hundred and seventy-seven, uttering counterfeit current coin.

PART XXXVII.—Sections four hundred and eighty-two, arson ; four hundred and eighty-three, attempt to commit arson ; four hundred and eighty-four, setting fire to crops ; four hundred and eighty-five, attempting to set fire to crops ; four hundred and eighty-eight, attempt to damage by explosives ; four hundred and eighty-nine, mischief on railways ; four hundred and ninety-two, injuries to electric telegraphs, &c. ; four hundred and ninety-three, wrecking ; four hundred and ninety-four, attempting to wreck ; four hundred and ninety-five, interfering with marine signals ; four hundred and ninety-eight, mischief to mines ; four hundred and ninety-nine, mischief.

2. Any one found committing any of the offences mentioned in the following sections, may be arrested without warrant by a PEACE OFFICER ;

PART XXVII.—Sections three hundred and fifty-nine, obtaining by false pretense ; three hundred and sixty, obtaining execution of valuable securities by false pretence.

PART XXXV.—Sections four hundred and sixty-five, exporting counterfeit coin ; four hundred and seventy-one, possessing counterfeit current coin ; four hundred and seventy-three paragraph (*b*), possessing counterfeit foreign gold or silver coin ; four hundred and seventy-three, paragraph (*d*), counterfeiting foreign copper coin.

PART XXXVII.—Sections four hundred and ninety-seven, cutting booms, or breaking loose rafts or cribs of timber or saw-logs ; five hundred, attempting to injure or poison cattle.

PART XXXVIII.—Sections five hundred and twelve, cruelty to animals ; five hundred and thirteen, keeping cock-pit.

3. A PEACE OFFICER may arrest, without warrant, any one whom he finds committing any offence against this Act, and ANY PERSON may arrest, without warrant, any one whom he finds *by night* committing any offence against this Act.

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 lawfull authority to arrest such person.

5. The OWNER of any property on or in respect to which any person is found committing an offence against this Act, 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 Her Majesty's service, any WARRANT OF PETTY OFFICER in the navy, and any NON-COMMISSIONED OFFICER OF MARINES may arrest without warrant any person found committing any of the offences mentioned in section one hundred and nineteen of this Act.

7. Any PEACE OFFICER may, without a warrant, take into custody any person whom he finds lying or loitering in any highway, yard or other place *during the night*, and whom he has good cause to suspect of having committed, or being about to commit, any indictable offence, and may detain such person until he can be brought before a justice of the peace, to be dealt with according to law ;

(*a.*) No person who has been so apprehended shall be detained after noon of the following day without being brought before a justice of the peace.

For definition of "Peace officer," see Art. 3 (*s*), *ante*, p. 5.

"Night" is the interval between 9 p. m. and 6 a. m. of the following day, (Art. 3 *q*.)

The following is an alphabetical list of the offences enumerated in clause 1 of the above Article, 552, and for which an offender, when found committing any of them, may be arrested, without warrant, *by any one* :—

Assaults on the Queen, (Article 71).

Administering, taking or procuring unlawful oaths, (Articles 120, 121).

Abduction, (Article 281).

Arson, setting fires, etc. (Articles 482, 483, 484, 485).

Attempt to damage by explosives, (Article 488).

Being at large while under sentence of imprisonment, (Article 159).

Breaking prison, (Article 161).

Bringing stolen property into Canada, (Article 355).

Breaking place of worship. (Articles 408, 409).

Burglary, housebreaking, shopbreaking, etc. (Articles 410, 411, 412, 413, 414).

Being found in a dwelling by night, (Article 415).

Being found armed with intent to break a dwellinghouse, (Article 416)

Being disguised or in possession of housebreaking instruments; (Article 417).

Counterfeiting seals; Counterfeiting stamps, (Articles 425, 435).

Counterfeiting gold and silver coin; Making coining instruments; and Uttering counterfeit current coin, (Articles 462, 466, 477).

Clipping current coin; Possessing clippings, (Articles 468, 470).

Counterfeiting copper coin. (Article 472).

Counterfeiting foreign gold and silver coin, (Article 473).

Defiling children. (Article 269).

Demanding by threatening letters. (Article 403).

Demanding with intent to steal, (Article 404).

Endangering persons on railways, (Articles 250, 251).

Escapes, (Articles 163, 164).

Extortion by threats, (Article 405).

Forcibly compelling execution of documents, (Article 402).

Forgery; Uttering forged documents; Possessing forged bank notes; Using probate obtained by forgery or perjury; Making, having or using forgery instruments (Articles 423, 424, 430, 432, 434)

Falsifying register, (Article 436).

Inciting to mutiny, (Article 72).

Injuring or attempting to injure by explosives, (Articles 247, 248).

Injuring electric telegraph, etc, (Article 492).

Interfering with marine signals, (Article 495).

Murder ; Attempt to murder ; Accessory to murder, (Articles 231, 232, 235).

Manslaughter, (Article 236).

Mischief on railways, etc. (Articles 489, 498, 499).

Piracy ; Piratical acts ; Piracy with violence,(Articles 127,128,129).

Personation, (Article 458).

Riot act, offences respecting reading of, (Article 83).

Riotous destruction ; Riotous damage, (Articles 85, 86).

Rape ; Attempt to commit rape, (Articles 267, 268).

Receiving stolen property, (Article 314).

Robbery; Aggravated robbery; Assault with intent to rob,(Articles 398, 399, 400).

Stopping the mail, (Article 401).

Suicide, attempt at, (Article 238).

Stupefying in order to commit indictable offence, (Article 244).

Treason ; Accessory ; Treasonable offences, (Articles 65, 67, 68, 69, 70).

Theft by agent, etc. (Article 320).

Unnatural offence, (Article 174).

Wreck, preventing escape from, (Article 254).

Wrecking ; Attempt to wreck, (Articles 493, 494).

Wounding, (Articles 241, 242).

"FOUND COMMITTING" has been held to mean either seeing the party actually committing the offence or pursuing him immediately or continuously after he has been seen committing it ; so that to justify the arrest, without warrant, of an offender, on the ground of his being *found committing* an offence. he must be taken in the very act of committing it, or there must be such fresh and continuous pursuit of him from his being seen and surprised in the act until his actual capture that the finding him in the act and his subsequent pursuit and capture may be considered to constitute one transaction. (1) Immediately means immediately after the *commission* of the offence, and not immediately after the *discovery* of its commission. Pursuit after an interval of three hours would not be a fresh pursuit. (2)

(1) R. v. Curran, 3 C. & P. 397 ; 1 Russ, Cr. 5 Ed. 715 ; Hanway v. Boultbee, 1 M. & R. 15 ; Clarke's Magist. Man. 42.

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

It seems that if the offender be seen in the commission of an offence by one person he may be arrested by another person who did not see him committing it. (1)

The following is a list, alphabetically arranged, of the offences mentioned in clause 2 of the above Article 552 and for which, when found committing, an offender may be arrested, without warrant, *by a peace officer:*

Attempting to injure or poison cattle, (Article 500).

Cruelty to animals, (Article 512).

Cutting booms, or breaking loose rafts or cribs of timber, (Article 497).

Counterfeiting foreing copper coin, (Article 473).

Exporting counterfeit coin, (Article 465).

Keeping cock-pit, (Article 513).

Obtaining by false pretence, (Article 359).

Obtaining execution of valuable securities by false pretence, (Article 360).

Possessing counterfeit current coin, (Article 471).

Possessing counterfeit foreign gold or silver coin, (Article 473).

See Articles 22–39, and full notes, illustrations, and authorities, as to arrests without warrant, at pp. 18–27, *ante.*

The Criminal Procedure Act, R.S.C., chap. 174 (which is now repealed) contained a provision (section 26) under which a person to whom any property was offered, for sale, or for pawn, was, if he had reasonable cause to suspect that an offence had been committed on or with respect to such property, empowered to apprehend, and carry before a justice of the peace, the person offering the same, together with such property, to be dealt with according to law.

But the Pawnbrokers' Act, (R.S.C., c. 128), is still in force, and contains, in sections 9 and 10, the following provisions:

"If any person offers to any pawnbroker, by way of pawn or pledge, or of exchange or sale, any goods, and is not able or refuses to give a satisfactory account of himself, or of the means whereby he became possessed of the goods, or wilfully gives any false information to the pawnbroker or his servant, as to whether such goods are his own property or not, or as to his name and place of abode, or as to the owner of the goods,—or if there is any other reason to suspect that such goods have been stolen or otherwise illegally or clandestinely obtained,—or if any person not entitled, or not having any color of title by law to redeem goods that have been pawned, attempts to redeem them, the person to whom the goods first above mentioned are offered to be pawned, or to whom the offer to redeem the goods in pawn is made, may seize and detain the person offering to pawn, and the goods offered to be pawned, or the person offering to redeem, as aforesaid, and shall convey such person and the goods offered to

(1) R. v. Howarth, R. & M., C. C. R. 207.

be pawned, or the person offering to redeem, and immediately deliver the person so offering to pawn and the goods offered to be pawned, or the person so offering to redeem, into the custody of a peace officer or constable, who shall, as soon as possible, convey such person and goods, or such person, as the case may be, before a justice of the peace of the district or county." (Sec. 9.)

"If such justice of the peace, upon examination and inquiry, has cause to suspect that such goods have been stolen or illegally or clandestinely obtained, or that the person offering to redeem them has not any pretence or color of right so to do, he shall commit the offender into safe custody for such reasonable time as is necessary for obtaining proper information, in order to be further examined; and if, upon either examination, it appears to the satisfaction of the justice that such goods were stolen or illegally or clandestinely obtained, or that the person offering to redeem them had not any pretence or color of right so to do, he shall, unless the offence authorizes such commitment by any other law, commit the offender to the common gaol of the district or county where the offence was committed, for any term not exceeding three months." (Sec. 10.)

PART XLIV.

Modes of prosecution.—Before the coming into force of the present Code there were four entirely different modes of proceeding against a person accused of having committed a criminal offence.

These different modes of prosecution and the changes proposed to be made by the English Draft Code were explained and commented upon by the Royal Commissioners in their report, in the following terms;—

"He [the accused] may be taken before a Magistrate, and committed for trial: he may, except in a few cases, be indicted by a Grand Jury, without being so committed; he may in the case of homicide be committed and tried upon a coroner's inquisition; and in cases of misdemeanor he may be put upon his trial by a Criminal Information filed either by the Attorney-General *ex officio*, or, if the Queen's Bench division so orders, by the Master of the Crown office, at the instance of a private person injured. (1)

According to the ancient theory of the law from which it still derives its force, the course is this: The Queen from time to tiem, sends Commissioners through the country to hear and determine all accusations of crime, and to deliver the gaols. The Grand Juries of the different counties accuse by way of *presentment* certain persons as offenders, and the accusations are referred to a petty jury, by whom they are disposed of.

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(1) For notes, illustrations and authorities on Criminal Informations, see pp. 244-248, *ante*; and for forms, see p. 262, *ante*.

The common practice is different: Suspected persons are brought before a justice of the peace by the police or by private complainants. The Magistrate takes the depositions of the witnesses, and either discharges the prisoner or commits him for trial. The accusation is put in the form of an indictment and laid before the Grand Jury, who, having heard the evidence, determine whether the accused is to be put upon his trial or not.

The Grand Jury are still, however, in theory, the sole accusers; but, inasmuch as they have long ceased to report matters within their own knowledge, and have come to act upon information supplied by others, any one can send up a bill before them accusing any person of any offence whatever, with certain specified exceptions.

The proceedings upon coroners' inquisitions is a relic of times preceding the appointment of justices of the peace. The Coroner and his jury at that time had a power of accusation concurrent with that of the Grand Jury, much as if a suspected person could in the present day be put on his trial upon the Magistrate's commital without any bill being found by the Grand Jury.

As to Criminal Informations they form a mode of proceeding adopted in peculiar cases, and call for no observation here.

In all common cases we think that of these modes of prosecution, that of initiating the charge before a magistrate is by far the fairest and most satisfactory in every way. It gives suspected persons full notice of the case against them, and it enables the judge and jury, who finally dispose of the prosecution, to discharge their duties with confidence that the whole matter has been properly prepared for their decision.

It is, moreover, the common mode in use. All others have become exceptional, and we think that, being the common course, it ought to be made imperative, in all cases.

We doubt whether the existence of the power to send up a bill before a Grand Jury without a preliminary enquiry before a magistrate, the extent of this power, and the facilities which it gives for abuse, are generally known.

It is not improbable that many lawyers, and most persons who are not lawyers, would be surprised to hear that, theoretically, there is nothing to prevent such a transaction as this:—Any person might go before a Grand Jury, without giving any notice of his intention to do so. He might there produce witnesses, who would be examined in secret, and of whose evidence no record would be kept, to swear, without a particle of foundation for the charge, that some named person had committed any atrocious crime. If the evidence appeared to raise a *prima facie* case, the Grand Jury, who cannot adjourn their enquiries, who have not the accused person before them, who have no means of testing in any way the evidence produced, would probably find the bill. The prosecutor would be entitled to a certificate from the officer of the Court that the indictment had been found. Upon this he would be entitled to get a warrant for the

arrest of the person indicted, who on proof of his identity must be committed to prison. The person so committed would not be entitled as of right, to bail, if his alleged offence were felony. Even if he were bailed, he would have no means of discovering upon what evidence he was charged, and no other information as to his alleged offence than he could get from the warrant: as he would not be entitled by law to see the indictment or hear it read till he was called upon to plead. He would have no legal means of obtaining the least information as to the nature of the evidence to be given, or (except in cases of treason) even as to the names of the witnesses to be called against him; and he might thus be tried for his life without having the smallest chance of preparing for his defence, or the least information as to the character of the charge.

Of course, in practice, the conviction of an innocent man, under such circumstances, would be practically impossible. The judge would postpone the trial, the jury would acquit the prisoner, the prosecutor would probably be subjected to exemplary damages in an action for malicious prosecution; but it still remains that such is the law, though it could not be put in force without shocking the feelings of the whole community. That such, however, is the law, subject only to certain exceptions hereinafter mentioned, there can be no doubt.

Although the law is theoretically the same in Ireland, a salutory practice has prevailed there, whereby if the accused has not been *committed* for trial, a private prosecutor is not permitted to lay an indictment before the Grand Jury without the leave of the presiding Judge, obtained in open Court.

The exceptions we have referred to are constituted by the statutes which provide that it shall not be lawful to present an indictment against any person for perjury, subornation of perjury, conspiracy, obtaining property by false pretences, keeping a gambling house, keeping a disorderly house, or any indecent assault, unless the prosecutor has been bound over to prosecute or give evidence, or unless the accused person has been committed to or detained in custody, or is bound by recognizance to appear to answer to the indictment, or unless the indictment is preferred with leave of the Court or of a Judge or the Attorney General, as in these statutes mentioned.

So far as it goes this legislation appears to us wise and sound. On the one hand, it secures, to the person accused, the fullest possible notice of the nature of the charge against him and of the evidence on which it is to be supported; on the other, it does not invest the Magistrate with an absolute veto, on a prosecution. It enables the prosecutor, if he thinks proper, to take the opinion of the Grand Jury as to whether the accused person should or should not be put on his trial. It is, however, impossible to defend, on any principle which occurs to us, the narrow range of the provisions. Why are indecent assaults included, and other charges of indecency, most easily made, most hard to refute, and commonly employed as the engines of extortion, excluded? On what possible ground can it be right that a

man should be at liberty to accuse another of murder, piracy, or arson, without giving him notice of the nature of the charge against him, whilst he is obliged to give him notice if he charges him with perjury or conspiracy? It is obvious that this legislation was partial and tentative.

As to persons committed upon a coroner's inquisition, the common though not universal practice is to take a prisoner, committed before the Coroner, before a Magistrate. We do not undervalue the coroner's inquest; but we see no reason why, in cases in which they result in a committal for murder or manslaughter, the suspected person should not have a right, by law, to be taken before a magistrate, and have the advantages which other accused persons possess; and upon the whole we propose to extend the principle of the Vexatious Indictments Act to all offences whatever, except those which are tried on Criminal Informations.

Section 505 (1) accordingly provides that no one except the Attorney-General may prefer any Bill of indictment, unless he is bound over to prosecute, or unless he has the written consent of a judge of the High Court (2) or of the Attorney-General, or of the court before which the Bill is to be preferred, to do so; and section 506 (3) enacts that, henceforth, no one shall be tried upon a coroner's inquisition.

The effect of this will be that, as a rule, no one will be liable to be indicted without a preliminary enquiry being first held before a magistrate.

Should these proposals be adopted the regular course of a prosecution would consist of the following steps:

1. Procuring the appearance of the suspected person before a magistrate, either by *summary* arrest, *summons*, or *warrant*:

2. The preliminary hearing before the Magistrate, resulting either in the discharge or committal of the prisoner, and, in the case of his discharge, being followed, or not, by the binding over of the prosecutor.

3. The preferring of the indictment before the Grand Jury:

4. The trial:

5. Proceedings by way of appeal subsequent to the trial.

We have provided in section 440, (4) with respect to both warrants and summonses, that they should not be refused by a magistrate merely because the alleged offender may be arrested *without* a warrant. This we believe to express the spirit, though not to be found in the letter of the present law.—We are, however, informed that some justices take a different view, and refuse in cases of felony to

(1) Section 505 of the English Draft is to the same effect as Article 641 of the present Code (See Art. 641, *post*).

(2) Instead of the words "High Court" our Article, 641, uses the words "any Court of Criminal Jurisdiction."

(3) See article 642, *post*.

(4) See article 559, *post*.

issue either a warrant or a summons, leaving the person applying for one to arrest the alleged offender on his own responsibility." Eng. Commrs.' Rep.

COMPELLING APPEARANCE OF ACCUSED BEFORE JUSTICE.

553. Magisterial jurisdiction.—For the purposes of this Act, the following provisions shall have effect with respect to the jurisdiction of justices :

(*a.*) Where the offence is committed in any water, tidal or other, 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.

This Article is, in effect, if not in words, a re-enactment of sections 10, 11, and 12 of R.S.C., c. 174, which were derived from sections 12 and 13 of the Imperial statute, 7 Geo. 4, c. 64 ; clause (*b*) being only slightly varied from the wording of section 12 of 7 Geo. 4, c. 64, which is as follows : "Where a *felony or misdemeanor* is committed on the boundary of two or more *counties*, or within the distance of five hundred yards from any such boundary or is *begun* in *one county* and *completed* in *another*, the venue may be laid in either *county*, in the same manner as if it had been committed therein."

In cases of murder or manslaughter, where the cause of death arises in one magisterial jurisdiction and the death takes place in another, it seems that the prisoner may, under the above Article, be indicted in either jurisdiction. (1)

If a man commit a theft in one magisterial jurisdiction and carry the stolen goods with him into another, he may be indicted within the limits of the jurisdiction where he committed it, or in the place into which, or any of the places through which he carried the goods ; for in contemplation of law there is such a taking and carrying away as to constitute the offence of theft in every place

(1) 1 Russ. Cr. & M. (by Greaves), 4 Ed , 753.

through which, at any distance of time, the goods were carried by him. (1) For instance where a prisoner, on the 4th of November, stole a note in Yorkshire, and, upon the 4th of March, he carried it into Durham, the judges were clear, upon a case reserved, that the interval between the first taking and carrying the note into Durham did not prevent it from being a theft in Durham, and that the conviction in that county was right. (2)

A country bank note was stolen during its transit, through the post, from Swindon, a town in Wiltshire, to the City of Bristol, which lies between the counties of Somerset and Gloucester, and the same note was afterwards enclosed by the defendant in a letter posted by him in Somersetshire and addressed to the Bankers at Swindon, requesting payment of it, which letter, with the bank note in it, arrived in due course at Swindon. The defendant was held triable in Wiltshire, the possession of the Post Office servants or of the Bankers at Swindon, in Wiltshire, being held, for this purpose, the defendant's possession 3)

A charge of sending a threatening letter may be prosecuted either in the Magisterial jurisdiction where the prosecutor received it, or in the place from which the offender sent it; because the offence, in such a case, is begun in the one and completed in the other. (4)

Where money obtained by a false pretence was transmitted in a letter posted, in accordance with the defendant's request, in County A., but which reached him in County B. it was held that this was an obtaining of the money in County A. (5)

If two persons steal a thing in one county, though one of them alone carry the property into another county, yet if both afterwards co-operate to secure the thing in the latter county both may be indicted there; for the subsequent concurrence may be connected with the previous taking. Thus, two men, named County and Donovan, laid a plan to obtain, under pretence of buying them, some coats which were in the possession of a woman, at a public house, in Surrey. After making a pretended bargain to buy them from her, the two prisoners induced the prosecutrix to leave the coats with one of them (Donovan), whilst she went with the other prisoner, County, who asked her to go with him, and he would get the money to pay her for the coats. In the prosecutrix's absence Donovan carried off the coats into Middlesex, and the other prisoner, County, afterwards joined him there, and concurred in securing them. The indictment was laid against the prisoners, in Middlesex, and, upon a case reserved, the judges were unanimous that, as County was present aiding and abetting in *Surrey* at the original larceny, his concurrence afterwards in *Middlesex*, though after an interval, might be connected with the original taking, and brought down, as larceny, to the subsequent possession in *Middlesex*. They therefore held the conviction right. (6)

Where two jointly committed a theft in one county, and one of them carried the stolen goods into another county, the other still accompanying him, without their ever being separated, they were held both indictable in either county; the possession of one being the possession of both, in each of the counties, as long as they continued in company. (7)

The taking into the other county or jurisdiction must be *animo furandi*. For instance, a constable apprehended a prisoner with two stolen horses at

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(1) 1 Hale, 507; 2 Hale, 163; 3 Inst. 113; 1 Hawk., c. 33, s. 52, 4 Bl. Com. 304; 2 East, P. C. 771.

(2) R. v. Parkin, 1 Mood. C. C., 45.

(3) R. v. Cryer, Dears. & B. 324; 36 L. J. (M. C.) 192.

(4) R. v. Girdwood, 2 East. P. C. 1120; 1 Leach, 142; R. v. Esser, 2 East. P. C., 1125; R. v. Burdett, 4 B. & Ald. 95.

(5) R. v. Jones, 1 Den. 551; 19 L. J. (M. C.) 162; R. v. Buttery, 4 B. & Ald. 179.

(6) R. v. County & Donovan, East. T. 1816, M.S. Bailey, J., 2 Russ. 175, *cit. in* Arch. Cr. Pl. & Ev. 21 Ed. 41.

(7) R. v. McDonagh, Carr. Supp., 2d. Ed., 23

Croyden in Surrey. On being so arrested, the prisoner said he had been at Dorking to fetch the horses and that they belonged to his brother, who lived at Bromley. The police constable offered to go with him to Bromley; and they took the horses and rode together as far as Beckenham Church, when the prisoner said he had left a parcel at the *Black Horse*, in some place in Kent. The constable, accordingly, went there with him, each riding one of the horses. When they got there, the constable gave the horses to the ostler. The prisoner did not enquire for any parcel, but made his escape, and was, afterwards, again apprehended in Surrey, and indicted in Kent for stealing the two horses. Upon a case reserved, the judges were unanimously of opinion that there was no evidence to be left to the jury of stealing in Kent. (1)

Where a theft was committed in County A., and the receiving of the property stolen took place in County B., it was held that both were triable in A., and that the stealing and receiving could both be alleged to have been in A. (2)

Where an offence has been committed within 500 yards of the boundary between two magisterial jurisdictions, it seems that Clause (*b*) of Article 553 will not enable the prosecutor to lay it in one jurisdiction and try it in another, but it merely gives him the option of both laying and trying the offence in either jurisdiction. (3)

With regard to Clause (*c*) of Article 553, it seems that, in order to maintain an indictment in a magisterial jurisdiction other than that in which an offence has been committed, in respect of property in or upon a vehicle or vessel employed in a journey, etc., it would be necessary to prove that the offence was committed *in* or *upon* the vehicle or vessel itself. For instance, a defendant was held to bail to appear at the Cumberland Assizes to answer a charge of stealing committed on a journey. He had acted as guard of a coach from Penrith in the county of Cumberland to Kendal in Westmoreland, and was entrusted with a banker's parcel, containing bank notes and two sovereigns. On changing horses at some distance from Penrith, he carried the parcel to a privy, and while there took out of it the sovereigns: and Parke, B., held that as the act of stealing was not "in or upon the coach," the case was not within the statute, and the felony having been committed in Westmoreland, the indictment ought to be preferred in that county. (4)

Clause (*c*) is not confined to the carriages of common carriers or to public conveyances, but extends to any vehicle employed in any journey. (5)

554. When a justice may compel appearance.—Every justice may issue a warrant or summons as hereinafter mentioned to compel the attendance of an accused person before him, for the purpose of preliminary inquiry in any of the following cases:

(*a.*) If such person is accused of having committed in any place whatever an indictable offence triable in the province in which such justice resides, and is, or is suspected to be, within the limits over which such justice has jurisdiction, or resides or is suspected to reside within such limits;

(*b.*) If such person, wherever he may be, is accused of having committed an indictable offence within such limits;

(*c.*) If such person is alleged to have any where unlawfully received property which was unlawfully obtained within such limits;

(1) R. v. Simmonds, 1 Mood. C. C. 408.
(2) R. v. Hinley, 2 M. & Rob 524.
(3) R. v. Mitchell, 2 G. & Dav. 274; 2 Q. B. 638.
(4) Sharpe's Case, 2 Lew. 233.
(5) R. v. Sharpe, Dears. 415; 24 L. J. (M. C.) 40; Arch. Cr. Pl. & Ev. 21 Ed. 42.

(*d.*) If such person has in his possession, within such limits, any stolen property.

555. Offences committed in certain parts of Ontario.—All offences committed in any of the unorganized tracts of country in the province of Ontario, including lakes, rivers and other waters therein, not embraced within the limits of any organized county, or within any provisional judicial district, may be laid and charged to have been committed and may be enquired of, tried and punished within any county of such province; and such offences shall be within the jurisdiction of any court having jurisdiction over offences of the like nature committed within the limits of such county, before which court such offences may be prosecuted; and such court shall proceed therein to trial, judgment and execution or other punishment for such offence, in the same manner as if such offence had been committed within the county where such 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 Gaspé.—Whenever any offence is committed in the district of Gaspé, the offender, if committed to gaol before trial, may be committed to the common gaol of the county in which the offence was committed, or may, in law, be deemed to have been committed, and if tried before the Court of Queen's Bench, he shall be so tried at the sitting of such court held in the county to the gaol of which he has been committed, and if imprisoned in the common gaol after trial he shall be so imprisoned in the common gaol of the county in which he has been tried. R.S.C., c. 174, s. 15.

557. Offences committed out of the Magistrate's Jurisdiction.—The preliminary inquiry may be held either by one justice or by more

justices than one : Provided that if the accused person is brought before any justice charged with an offence committed out of the limits of the jurisdiction of such justice, such justice may, after hearing both sides, order the accused at any stage of the inquiry to be taken by a constable before some justice having jurisdiction in the place where the offence was committed. The justice so ordering shall give a warrant for that purpose to a constable, which may be in the FORM A IN SCHEDULE ONE hereto, (1) 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, (2) 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.

558. Laying information.—Any one who, upon reasonable or probable grounds, believes that any person has committed an indictable offence against this Act may make a complaint or lay an information in writing and under oath before any magistrate or justice of the peace having jurisdiction to issue a warrant or summons against such accused person in respect of such offence.

2. Such complaint or information may be in the FORM C in SCHEDULE ONE hereto, (3) or to the like effect.

559. Hearing on information.—Upon receiving any such complaint or information the justice shall hear and consider the allegations of the complainant, and if of opinion that a case for so doing is made out he shall issue a summons or warrant, as the case may be, in manner hereinafter mentioned, and such justice shall not refuse to issue such summons or warrant, only because the alleged offence is one for which an offender may be arrested without warrant. R.S.C., c. 174, s. 30.

560. Warrant in cases of offences committed on high seas, etc.—Whenever any indictable offence is committed on the high seas, or in any creek, harbour, haven or other place in which the Admiralty

(1) For Form A, see p. 543, *post*.
(2) For Form B, see p. 544, *post*.
(3) For Form C, see p. 545, *post*.

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, (1) or to the like effect, to apprehend such person, to be dealt with as herein and hereby directed. R.S.C., c. 174, s. 32.

561. Arrest of suspected deserters.—Every one who is reasonably suspected of being a deserter from Her Majesty's service may be apprehended and brought for examination before any justice of the peace, and if it appears that he is a deserter he shall be confined in gaol until claimed by the Military or Naval authorities, or proceeded against according to law. R.S.C., c. 169, s. 6.

2. No one shall break open any building to search for a deserter unless he has obtained a warrant for that purpose from a justice of the peace,—such warrant to be founded on affidavit that there is reason to believe that the deserter is concealed in such building, and that admittance has been demanded and refused; and every one who resists the execution of any such warrant shall incur a penalty of eighty dollars, recoverable on summary conviction in like manner as other penalties under this Act. R.S.C., c. 169, s. 7.

See articles 73 and 74, *ante*, pp. 48 and 49.

See appendix, for sec. 9, R.S.C., c. 169, (remaining unrepealed).

562. Contents of summons.—Service.—Every summons issued by a justice under this Act shall be directed to the accused, and shall require him to appear at a time and place to be therein mentioned. Such summons may be in the FORM E in SCHEDULE ONE hereto, (2) or to the like effect. No summons shall be signed in blank.

2. Every such summons shall be served by a constable or other peace officer upon the person to whom it is directed, either by delivering it to him personally or, if such person cannot conveniently be met with, by leaving it for him at his last or most usual place of abode with some inmate thereof apparently not under sixteen years of age.

3. The service of any such summons may be proved by the oral testimony of the person effecting the same or by the affidavit of such person purporting to be made before a justice.

563. Warrant to arrest, in the first instance.—The warrant issued by a justice for the apprehension of the person against whom an information or complaint has been laid as provided in section five hundred and fifty-eight may be in the FORM F in SCHEDULE ONE hereto, (3) or to the like effect. No such warrant shall be signed in blank.

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(1) For Form D, see p. 545, *post*.
(2) For Form E, see p. 545, *post*.
(3) For form F, see p. 546, *post*.

2. Every such warrant shall be under the hand and seal of the justice issuing the same, and may be directed, either to any constable by name, or to such constable, and all other constables within the territorial jurisdiction of the justice issuing it, or generally to all constables within such jurisdiction.

3. The warrant shall state shortly the offence for which it is issued, and shall name or otherwise describe the offender, and it shall order the officer or officers to whom it is directed to apprehend the offender and bring him before the justice or justices issuing the warrant, or before some other justice or justices, to answer to the charge contained in the said information or complaint, and to be further dealt with according to law. It shall not be necessary to make such warrant returnable at any particular time, but the same shall remain in force until it is executed.

4. The fact that a summons has been issued shall not prevent any justice from issuing such warrant at any time before or after the time mentioned in the summons for the appearance of the accused; and where the service of the summons has been proved and the accused does not appear, or when it appears that the summons cannot be served, the warrant (FORM G) may issue.(1) R.S.C., c. 174, ss. 43, 44 and 46.

564. Execution of warrant.—Every such warrant may be executed by arresting the accused wherever he is found in the territorial jurisdiction of the justice by whom it is issued, or in the case of fresh pursuit, at any place in an adjoining territorial division within seven miles of the border of the first-mentioned division. R.S.C., c. 174, ss 47 and 48.

2. Every such warrant may be executed by any constable named therein, or by any one of the constables to whom it is directed, whether or not the place in which it is to be executed is within the place for which he is constable.

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.

565. Proceeding when the offender is not within the justice's jurisdiction.—If the person against whom any warrant has been issued cannot be found within the jurisdiction of the justice by whom the same was issued, but is or is suspected to be in any other part of Canada, any justice within whose jurisdiction he is or is suspected to be, upon proof being made on oath or affirmation of the 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

(1) For form G, see p. 546, *post*.

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 justices for the same territorial division. Such endorsement may be in the FORM H IN SCHEDULE ONE hereto. (1) R.S.C., c. 174, s. 49.

566. Disposal of person arrested on endorsed warrant.—If the prosecutor or any of the witnesses for the prosecution are in the territorial division where such person has been apprehended upon a warrant endorsed as provided in the last preceding section the constable or other person or persons who have apprehended him may, if so directed by the justice endorsing the warrant, take him before such justice, or before some other justice for the same territorial division; and the said justice may thereupon take the examination of such prosecutor or witnesses, and proceed in every respect as if he had himself issued the warrant. R.S.C., c. 174, s. 50.

567. Bringing arrested person before a justice.—When any person is arrested upon a warrant he shall, except in the case provided for in the next preceding section, be brought as soon as is practicable before the justice who issued it or some other justice for the same territorial division, and such justice shall either proceed with the inquiry or postpone it to a future time, in which latter case he shall either commit the accused person to proper custody or admit him to bail or permit him to be at large on his own recognizance according to the provisions hereinafter contained.

568. Coroner's inquisition.—Every coroner, upon any inquisition taken before him whereby any person is charged with manslaughter or murder, shall (if the person or persons, or either of them, affected by such verdict or finding be not already charged with the said offence before a magistrate or justice), by warrant under his hand, direct that such person be taken into custody and be conveyed, with all convenient speed, before a magistrate or justice; or such coroner may direct such person to enter into a recognizance before him, with or without a surety or sureties, to appear before a magistrate or justice. In either case, it shall be the duty of the coroner to transmit to such magistrate or justice, the depositions taken before him in the matter. Upon any such person being brought or appearing before any such magistrate or justice, he shall proceed in all respects as though such person had been brought or had appeared before him upon a warrant or summons.

Article 642, *post*, declares that no one shall henceforth be tried on any Coroner's inquisition.

569. Search warrants, generally.—Any justice who is satisfied by information upon oath in the FORM J in SCHEDULE ONE hereto, (2) that there is reasonable ground for believing that there is in any building, receptacle, or place—

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(1) For form H, see p. 547, *post*.
(2) For form J, see p. 548, *post*.

(*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, (1) or to the like effect.

4. When any such thing is seized and brought before such justice he may detain it, taking reasonable care to preserve it till the conclusion of the investigation ; and, if any one is committed for trial, he may order it further to be detained for the purpose of evidence on the trial. If no one is committed, the justice shall direct such thing to be restored to the person from whom it was taken, except in the cases next hereinafter mentioned, unless he is authorized or required by law to dispose of it otherwise. In case any improved arm or ammunition in respect to which any offence under section one hundred and sixteen has been committed has been seized, it shall be forfeited to the Crown. R.S.C., c. 50, s. 101.

5. If under any such warrant there is brought before any justice any forged bank note, bank note-paper, instrument or other thing, the possession whereof in the absence of lawful excuse is an offence under any provision of this or any other Act, the court to which any such person is committed for trial or, if there is no commitment for trial, such justice may cause such thing to be defaced or destroyed. R.S.C., c. 174, s. 55.

6. If under any such warrant there is brought before any justice, any counterfeit coin or other thing the possession of which with knowledge of its nature and without lawful excuse is an indictable offence under any provision of Part XXXV. of this Act, every such thing as soon as it has been produced in evidence, or as soon as it appears that it will not be required to be so 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

(1) For Form I, see p. 548, *post*.

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 purpose dangerous to the public peace; and any person from whom any such offensive weapons are so taken may, if the justice of the peace upon whose warrant the same are taken, upon application made for that purpose, refuses to restore the same, apply to a judge of a superior or county court for the restitution of such offensive weapons, upon giving ten days' previous notice of such application to such justice; and such judge shall make such order for the restitution or safe custody of such offensive weapons as upon such application appears to him to be proper. R.S.C., c. 149, ss. 2 and 3.

10. If goods or things by means of which it is suspected that an offence has been committed under Part XXXIII, are seized under a search warrant, and brought before a justice, such justice and one or more other justice or justices shall determine summarily whether the same are or are not forfeited under the said Part XXXIII.; and if the owner of any goods or things which, if the owner thereof had been convicted, would be forfeited under this Act, is unknown or cannot be found, an information or complaint may be laid for the purpose only of enforcing such forfeiture, and the said justice may cause notice to be advertised stating that unless cause is shown to the contrary at the time and place named in the notice, such goods or things will be declared forfeited; and at such time and place the justice, unless the owner, or any person on his behalf, or other person interested in the goods or things, shows cause to the contrary, may declare such goods or things, or any of them, forfeited. 51 V., c. 41, s. 14.

570. Search for public stores.—Any constable or other peace officer, if deputed by any public department, may, within the limits for which he is such constable or peace officer, stop, detain and search any person reasonably suspected of having or conveying in any manner any public stores defined in section three hundred and eighty-three, stolen or unlawfully obtained, or any vessel, boat or vehicle in or on which there is reason to suspect that any public stores stolen or unlawfully obtained may be found.

2. A constable or other peace officer shall be deemed to be deputed within the meaning of this section if he is deputed by any writing signed by the person who is the head of such department, or who is authorized to sign documents on behalf of such department.

571. Search warrant for mined gold, silver, etc.—On complaint in writing made to any justice of the county, district or place, by any person interested in any mining claim, that mined gold or gold-bearing quartz, or mined or unmanufactured silver or silver-ore, is unlawfully deposited in any place, or held by any person contrary to law, a general search warrant may be issued by such justice, as in the case of stolen goods, including any number of places or persons named in such complaint; and if, upon such search, any such gold or gold-bearing quartz, or silver or silver-ore is found to be unlawfully deposited or held, the justice shall make such order for the restoration thereof to the lawful owner as he considers right.

2. The decision of the justice in such case is subject to appeal as in ordinary cases coming within the provisions of Part LVIII. R.S.C., c. 174, s. 53.

As to conditions of Appeal, see Article 880 *post*.

572. Search by peace officer for detained lumber, etc.—If any constable or other peace officer has reasonable cause to suspect that any timber, mast, spar, saw-log or other description of lumber, belonging to any lumberman or owner of lumber, and bearing the registered trade mark of such lumberman or owner of lumber, is kept or detained in any saw-mill, mill-yard, boom or raft, without the knowledge or consent of the owner, such constable or other peace officer may enter into or upon the same, and search or examine for the purpose of ascertaining whether such timber, mast, spar, saw-log or other description of lumber is detained therein without such knowledge and consent. R.S.C., c. 174, s. 54.

573. Search for and seizure of intoxicating liquors on Her Majesty's ships.—Any officer in Her Majesty's service, any warrant or petty officer of the navy, or any non-commissioned officer of marines, with or without seamen or persons under his command, may search any boat or vessel which hovers about or approaches, or which has hovered about or approached, any of Her Majesty's ships or vessels mentioned in section one hundred and nineteen, Part VI, of this Act, and may seize any intoxicating liquor found on board such boat or vessel; and the liquor so found shall be forfeited to the Crown. 50-51 V., c. 46, s. 3.

574. Warrants to search houses of ill-fame.—Whenever there is reason to believe that any woman or girl mentioned in section one hundred and eighty-five, Part XIII, has been inveigled or enticed to a house of ill-fame or assignation, then upon complaint thereof being made under oath by the parent, husband, master or guardian of such woman or girl, or in the event of such woman or girl having no known parent, husband, master nor guardian in the place in which the offence is alleged to have been committed, by any other person,

to any justice of the peace, or to a judge of any court authorized to issue warrants in cases of alleged offences against the criminal law, such justice of the peace or judge of the court may issue a warrant to enter, by day or night, such house of ill-fame or assignation, and if necessary use force for the purpose of effecting such entry whether by breaking open doors or otherwise, and to search for such woman or girl, and bring her, and the person or persons in whose keeping and possession she is, before such justice of the peace or judge of the court, who may, on examination, order her to be delivered to her parent, husband, master or guardian, or to be discharged, as law and justice require. R.S.C., c. 157, s. 7.

575. Searching gaming houses, betting houses, and lotteries.— If the chief constable or deputy chief constable of any city or town, or other officer authorized to act in his absence, reports in writing to any of the commissioners of police or mayor of such city or town, or to the police magistrate of any town, that there are good grounds for believing, and that he does believe, that any house, room or place within the said city or town is kept or used as a common gaming or betting-house as defined in Part XIV., sections one hundred and ninety-six and one hundred and ninety-seven, or is used for the purpose of carrying on a lottery, or for the sale of lottery tickets, contrary to the provisions of Part XV., section two hundred and five, whether admission thereto is limited to those possessed of entrance keys or otherwise, the said commissioners or commissioner, or mayor, or the said police magistrate, 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 the chief constable, deputy chief constable or other officer,—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, and all moneys and securities for money, or, 2,—all instruments or devices for the carrying on of such lottery, and all lottery tickets found in such house or premises. R.S.C., c. 158, s. 2.

2. The chief constable, deputy chief constable or other officer making such entry, in obedience to any 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 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 any such instruments or devices or lottery tickets as aforesaid, which he so finds. R.S.C., c. 158, s. 3.

3. The police magistrate or other justice of the peace 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, used in playing any game, and seized under this Act in any place used as a common gaming-house, or any such instruments or devices for the carrying on of a lottery, or any such

lottery tickets as aforesaid, to be forthwith destroyed, and any money or securities seized under this section shall be forfeited to the Crown for the public uses of Canada. R.S.C., c. 158, s. 5.

4. The expression "chief constable" includes chief of police, city marshal, or other head of the police force of any city, town or place. R.S.C., c. 158, s. 1.

5. The expression "deputy chief constable" includes deputy chief of police, deputy or assistant city marshal, or other deputy head of the police force of any city, town or place, and the expression "police magistrate" includes stipendiary magistrates.

576. Warrant to search for vagrants.—Any stipendiary or police magistrate, mayor or warden, or any two justices of the peace, upon information before them made, that any person described in Part XV, as a loose, idle or disorderly person. or vagrant, is or is reasonably suspected to be harboured or concealed in any disorderly house, bawdy-house, house of ill-fame, tavern or boarding-house, may, by warrant, authorize any constable or other person to enter at any time such house or tavern, and to apprehend and bring before them or any other justices of the peace, every person found therein so suspected as aforesaid. R.S.C., c. 157, s. 8.

FORMS UNDER PART XLIV.

FROM

SCHEDULE ONE.

A.—(*Section* 557.)

WARRANT TO CONVEY BEFORE A JUSTICE OF ANOTHER COUNTY.

Canada,
Province of ,
County of .

Whereas information upon oath was this day made before the undersigned, that A. B. of , on the day of , in the year , at , in the county of (*state the charge*).

And whereas I have taken the deposition of X. Y. as to the said offence.

And whereas the charge is of an offence committed in the county of .

This is to command you to convey the said (*name of accused*), of , before some justice of the last-mentioned county, near the above place, and to deliver to him this warrant and the said deposition.

Dated at , in the said county of this day of , in the year .

J. S.,

J. P., (*Name of county.*)

To of

B.—(*Section* 557.)

RECEIPT TO BE GIVEN TO THE CONSTABLE BY THE JUSTICE FOR THE COUNTY IN WHICH THE OFFENCE WAS COMMITTED.

Canada,
Province of ,
County of .

I, J. L., a justice of the peace in and for the county of , hereby certify that W. T., peace officer of the county of , has, on this day of , in the year , by virtue of and in obedience to a warrant of J. S., Esquire, a justice of the peace in and for the county of , produced before me one A. B., charged before the said J. S., with having (*etc., stating shortly the offence*), and delivered him into the custody of by my direction, to answer to the said charge, and further to be dealt with according to law, and has also delivered unto me the said warrant, together with the information (*if any*) in that behalf, and the deposition (*s*) of C. D. (*and of*), in the said warrant mentioned, and that he has also proved to me, upon oath, the handwriting of the said J. S. subscribed to the same.

Dated the day and year first above mentioned, at in the said county of .

J. L.,

J. P. (*Name of county.*)

C.—(*Section* 558.)

INFORMATION AND COMPLAINT FOR AN INDICTABLE OFFENCE.

Canada,
Province of ,
County of ,

The information and complaint of C. D. of (*yeoman*), taken this day of , in the year , before the undersigned (*one*) of Her Majesty's justices of the peace in and for the said county of , who saith that (*&c., stating the offence*).

Sworn before (*me*), the day and year first above mentioned, at

J. S.,

J. P., (*Name of county.*)

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.*

E.—(*Section* 562.)

SUMMONS TO A PERSON CHARGED WITH AN INDICTABLE OFFENCE.

Canada,
Province of ,
County of ,

To A. B., of , (*labourer*) :

Whereas you have this day been charged before the undersigned , a justice of the peace in and for the said county of

, for that you on , at (*stating shortly the offence*) : These are therefore to command you, in Her Majesty's name, to be and appear before (*me*) on , at o'clock in the (fore) noon, at , or before such other justice or justices of the peace for the same county of , as shall then be there, to answer to the said charge, and to be further dealt with according to law. Herein fail not.

Given under (*my*) hand and seal, this day of , in the year , at , in the county aforesaid.

J. S. [SEAL.]

J. P., Name of county.)

F.—(*Section* 563.)

WARRANT IN THE FIRST INSTANCE TO APPREHEND A PERSON CHARGED WITH AN INDICTABLE OFFENCE.

Canada,
Province of ,
County of .

To all or any of the constables and other peace officers in the said county of

Whereas A. B. of , (*labourer*), has this day been charged upon oath before the undersigned , a justice of the peace in and for the said county of , for that he, on , at , did (*&c.. stating shortly the offence*) : These are therefore to command you, in Her Majesty's name, forthwith to apprehend the said A. B., and to bring him before (*me*) (or some other justice of the peace in and for the said county of), to answer unto the said charge, and to be further dealt with according to law.

Given under (*my*) hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

J. P., (Name of county.)

G.—(*Section* 563.)

WARRANT WHEN THE SUMMNONS IS DISOBEYED

Canada,
Province of ,
County of .

To all or any of the constables and other peace officers in the said county of

Whereas on the day of , (instant *or* last past) A. B., of , was charged before (*me*

or *us*,) the undersigned (*or name the justice or justices, or as the case may be*), (*a*) justice of the peace in and for the said county of , for that (*&c., as in the summons*) ; and whereas I (*or* he *the said justice of the peace, or* we *or* they *the said justices of the peace*) did then issue (*my, our, his* or *their*) summons to the said A. B., commanding him, in Her Majesty's name, to be and appear before (*me*) on at o'clock in the (fore)noon, at , or before such other justice or 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 Her Majesty's name, forthwith to apprehend the said A. B., and to bring him before (*me*) or some other justice of the peace in and for the said county of , to answer the said charge, and to be further dealt with according to law.

Given under (*my*) hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL]

J. P., (*Name of county.*)

H.—(*Section* 565.)

ENDORSEMENT IN BACKING A WARRANT

Canada,
Province of ,
County of ,

Whereas proof upon oath has this day been made before me , a justice of the peace in and for the said county of , that the name of J. S. to the within warrant subscribed, is of the handwriting of the justice of the peace within mentioned : I do therefore hereby authorize W. T. who brings to me this warrant and all other persons to whom this warrant was originally directed, or by whom it may be lawfully executed, and also all peace officers of the said county of , to execute the same within the said last mentioned county.

Given under my hand, this day of , in the year , at ; in the county aforesaid.

J. L.,

J. P., (*Name of county.*)

I.—(*Section* 569.)

WARRANT TO SEARCH.

Canada,
Province of ,
County of ,

Whereas it appears on the oath of A. B. of , that there is reason to suspect that (*describe things to be searched for and offence in respect of which search is made*) are concealed in at

This is, therefore, to authorize and require you to enter between the hours of (*as the justice shall direct*) into the said premises, and to search for the said things, and to bring the same before me or some other justice.

Dated at , in the said county of , this day of , in the year

J. S.,

J. P., (*Name of county.*)

To of

J.—(*Section* 569.)

INFORMATION TO OBTAIN A SEARCH WARRANT.

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 county (*describe things to be searched for and offence in respect of which search is made*), of , who says that and that he has just and reasonable cause to suspect, and suspects, that the said goods and chattels, or some part of them are concealed in the (*dwelling-house, &c.*) of C. D., of , in the said county, (*here add the causes of suspicion, whatever they may be*): Wherefore (*he*) prays that a search warrant may be granted to him to search the (*dwelling-house, &c.*) of the said C. D., as aforesaid, for the said goods and chattels so feloniously stolen, taken and carried away as aforesaid.

Sworn (*or* affirmed) before me the day and year first above mentioned, at , in the said county of

J. S.,

J. P., (*Name of county.*)

PART XLV.

PROCEDURE ON APPEARANCE OF ACCUSED.

577. Enquiry by justice.—When any person accused of an indictable offence is before a justice, whether voluntarily or upon summons, or after being apprehended with or without warrant, or while in custody for the same or any other offence, the justice shall proceed to inquire into the matters charged against such person in the manner hereinafter defined.

578. Irregularity in procuring appearance.—No irregularity or defect in the substance or form of the summons or warrant, and no variance between the charge contained in the summons or warrant and the charge contained in the information, or between either and the evidence adduced on the part of the prosecution at the inquiry, shall affect the validity of any proceeding at or subsequent to the hearing. R.S.C., c. 174, s. 58.

579. Adjournment in case of variance.—If it appears to the justice that the person charged has been deceived or misled by any such variance in any summons or warrant, he may adjourn the hearing of the case to some future day, and in the meantime may remand such person, or admit him to bail as hereinafter mentioned. R.S C., c. 174, s. 59.

580. Procuring attendance of witnesses.—If it appears to the justice that any person being or residing within the province is likely to give material evidence either for the prosecution or for the accused on such inquiry he may issue a summons under his hand, requiring such person to appear before him at a time and place mentioned therein to give evidence respecting the charge, and to bring with him any documents in his posession 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. (1)

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

(1) For form K, see p. 566, *post*.

non-appearance, then (after proof upon oath that such summons has been served as aforesaid, or that the person to whom the summons is directed is keeping out of the way to avoid service) the justice before whom such person ought to have appeared, being satisfied by proof on oath that he is likely to give material evidence, may issue a warrant under his hand to bring such person at a time and place to be therein mentioned before him or any other justice in order to testify as aforesaid.

2. The warrant may be in the FORM L in SCHEDULE ONE hereto, (1) or to the like effect. Such warrant may be executed anywhere within the territorial jurisdiction of the justice by whom it is issued, or, if necessary, endorsed as provided in section five hundred and sixty-five and executed anywhere in the province but out of such jurisdiction. R.S.C., c. 174, s. 61.

3. If a person summoned as a witness under the provisions of this part is brought before a justice on a warrant issued in consequence of refusal to obey the summons such person may be detained on such warrant before the justice who issued the summons. or before any other justice in and for the same territorial division who shall then be there, or in the common gaol, or any other place of confinement, or in the custody of the person having him in charge, with a view to secure his presence as a witness on the day fixed for the trial ; or in the discretion of the justice such person may be released on recognizance, with or without sureties, conditioned for his appearance to give evidence as therein mentioned, and to answer for his default in not attending upon the said summons as for contempt; and the justice may, in a summary 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.) (2)

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, (3) or to the like effect, and may be executed anywhere within the jurisdiction of such justice, or, if necessary, endorsed as provided in section five hundred and sixty-five and executed anywhere in the province but out of such jurisdiction. R.S.C., c. 174, s. 62.

(1) For form L, see p. 567, *post.*
(2) For form PP, see reference under Article 781 to forms under Part LIV, *post.*
(3) For form M, see p. 567, *post.*

584. Procuring attendance of witnesses beyond the province.—If there is reason to believe that any person residing anywhere in Canada out of the province and not being within the province, is likely to give material evidence either for the prosecution or for the accused, any judge of a Superior Court or a County Court, on application therefor by the informant or complainant, or the Attorney-General, or by the accused person or his solicitor or some person authorized by the accused, may cause a writ of subpœna to be issued under the seal of the court of which he is a judge, requiring such person to appear before the justice before whom the inquiry is being held or is intended to be held at a time and place mentioned therein to give evidence respecting the charge and to bring with him any documents in his possession or under his control relating thereto.

2. Such subpœna shall be served personally upon the person to whom it is directed and an affidavit of such service by a person effecting the same purporting to be made before a justice of the peace, shall be sufficient proof thereof.

3. If the person served with a subpœna as provided by this section, does not appear at the time and place specified therein, and 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 (1) or to the like effect. If necessary, it may be endorsed in the manner provided by section five hundred and sixty-five, and executed in a district, county or place other than the one therein mentioned.

585. Commitment of a witness refusing to be examined.—Whenever any person appearing, either in obedience to a summons or subpœna, or by virtue of a warrant, or being present and being verbally required by the justice to give evidence, refuses to be sworn, or having been sworn, refuses to answer such questions as are put to him, or refuses or neglects to produce any documents which he is required to produce, or refuses to sign his depositions without in any such case offering any just excuse for such refusal, such justice may adjourn the proceedings for any period not exceeding eight clear days, and may in the meantime by warrant in FORM O in SCHEDULE ONE hereto, (2) 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

(1) For form N, see p. 568, *post*.
(2) For form O, see p. 569, *post*.

period, and so again from time to time until such person consents to do what is required of him.

2. Nothing in this section shall prevent such justice from sending any such case for trial, or otherwise disposing of the same in the meantime, according to any other sufficient evidence taken by him. R.S.C., c. 174, s. 63.

586. Discretionary powers of the justice.—A justice holding the preliminary inquiry may in his discretion :

(*a.*) permit or refuse permission to the prosecutor, his Counsel or Attorney to address him in support of the charge, either by way of opening or summing up the case, or by way of reply upon any evidence which may be produced by the person accused ;

(*b.*) receive further evidence on the part of the prosecutor after hearing any evidence given on behalf of the accused ;

(*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 : (1) Provided that no such remand shall be for more than eight clear days, the day following that on which the remand is made being counted as the first day ; and further provided, that if the remand is for a time not exceeding three clear days, the justice may verbally order the constable or other person in whose custody the accused then is, or any other constable or person named by the justice in that behalf, to keep the accused person in his custody and to bring him before the same or such other justice as shall be there acting at the time appointed for continuing the examination ; R.S.C., c. 174, s. 65.

(*d.*) order that no person other than the prosecutor and accused, their counsel and solicitor shall have access to or remain in the room or building in which the inquiry is held (which shall not be an open court), if it appears to him that the ends of justice will be best answered by so doing ;

(*e.*) regulate the course of the inquiry in any way which may appear to him desirable, and which is not inconsistent with the provisions of this Act.

587. Bail on remand.—If the accused is remanded under the next preceding section the justice may discharge him, upon his entering into a recognizance in the FORM Q in SCHEDULE ONE hereto, (2) 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.

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(1) For form P, see p. 570, *post*.
(2) For form Q, see p. 571, *post*.

588. **Hearing may be ordered to proceed during time of remand.**—The justice may order the accused person to be brought before him, or before any other justice for the same territorial division, at any time before the expiration of the time for which such person has been remanded, and the gaoler or officer in whose custody he then is shall duly obey such order. R.S.C., c. 174, s. 66.

589. **Breach of recognizance on remand.**—If the accused person does not afterwards appear at the time and place mentioned in the recognizance the said justice, or any other justice who is then and there present, having certified upon the back of the recognizance the non-appearance of such accused person, in the FORM R in SCHEDULE ONE hereto, (1) may transmit the recognizance to the clerk of the court where the accused person is to be tried, or other proper officer appointed by law, to be proceeded upon in like manner as other recognizances; and such certificate shall be *primâ facie* evidence of the non-appearance of the accused person. R.S.C., c. 174, s. 68.

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, (2) 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

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(1) For form R, see p. 571, *post*.
(2) For form S, see p. 572, *post*.

be signed by the justice and be accompanied by an affidavit of the stenographer that it is a true report of the evidence.

591. Evidence to be read to the accused.—After the examination of the witnesses produced on the part of the prosecution has been completed, and after the depositions have been signed as aforesaid, the justice unless he discharges the accused person, shall ask him whether he wishes the depositions to be read again, and unless the accused dispenses therewith shall read or cause them to be read again. When the depositions have been again read, or the reading dispensed with, the accused shall be addressed by the justice in these words, or to the like effect :

"Having heard the evidence, do you wish to say anything in answer to the charge? You are not bound to say anything, but whatever you do say will be taken down in writing and may be given in evidence against you at your trial. You must clearly understand that you have nothing to hope from any promise of favour and nothing to fear from any threat which may have been held out to you to induce you to make any admission or confession of guilt, but whatever you now say may be given in evidence against you upon your trial notwithstanding such promise or threat."

2. Whatever the accused then says in answer thereto shall be taken down in writing in the FORM T in SCHEDULE ONE hereto, (1) 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.

As to proof of the Statement at the Trial see article 689, *post*.

592. Evidence of confession or admission.—Nothing herein contained shall prevent any prosecutor from giving in evidence any admission or confession, or other statement, made at any time by the person accused or charged, which by law would be admissible as evidence against him. R.S.C., c. 174, s. 72.

Confessions are received in evidence or rejected under a consideration of whether they are or are not entitled to credit.

A free and voluntary confession of guilt made by a prisoner, either in course of conversation with private individuals, or under examination before a magistrate is admissible in evidence as perfectly legal and sufficient. (2)

A confession in order to be admissible must not be extracted by *any sort* of threats or violence nor be obtained by any *direct* or *implied* promises, however slight, nor by the exertion of any improper influence, but be entirely free and voluntary ; and in the case of a confession before a magistrate or other person, unless it be shewn affirmatively on the part of the prosecution that it was made without the defendant being induced to make it by any promise of favor, or by menaces or undue terror, it is not admissible in evidence against him.

A confession forced from the accused by the flattery of hope or the torture of fear comes in so questionable a shape, when it is to be considered as the

(1) For Form T, see p. 572, *post*.
(2) Gilb. Ev. 123 ; Lambe's case, 2 Leach, 252 ; Wheeling's case, 1 Leach, 311 ; R. v. Eldridge, R. & R., C. C. R. 440.

evidence of guilt that no reliance can be placed in it and no credit should be given to it.

Three men were tried and convicted of the murder of a Mr. Harrison. One of them under promise of pardon confessed himself guilty of the fact. The confession therefore was not given in evidence against him; and a few years afterwards it turned out that Mr. Harrison was alive. (1)

If it be said to the defendant that it will be better or worse for him if he do or do not confess; (2) or if a confession be procured by a threat to take the defendant before a magistrate, if he do not give a more satisfactory account; (3) or to send for a constable for that purpose; (4) or by saying, "Tell me where the things are, and I will be favorable to you;" (5) or, "You had better tell all you know;" (said by the surgeon to a woman suspected of poisoning; (6) or, "You had better tell where you got the property;" (7), or, "You had better split, and not suffer for all of them:" (8), or, "It would have been better if you had told at first;" (9), or, "I should be obliged to you if you would tell us what you know about it: if you will not, of course, we can do nothing; (10), or, "It will be best for you if you will tell how it was transacted;" (11), or, "It might be better for you to tell the truth, and not a lie;" or (12), "You had better tell the truth; it may be better for you;" (13), the confession will not be admissible.

Where the prosecutor asked the defendant or the money which he had taken; and, before it was produced, said, "I only want my money, and if you give me that, you may go to the devil if you please," upon which the defendant took part of the money from his pocket, and said that was all he had left, a majority of the judges held that the evidence was inadmissible. (14)

Where a constable said to the prisoner who was suspected of the murder of her child that, "if she did not tell him where it was she might get herself into trouble, and that it would be the worse for her," a statement thereupon made by her to the constable was rejected. (15)

A statement, made to a constable, after he had told the defendant the nature of the charge against him, and that he need not say anything to criminate himself, but that whatever he might say would be taken down and used as evidence against him, was held to be admissible. (16)

A made to B. a confession which was inadmissible in evidence in consequence of its having been made after a promise held out by B. The latter, shortly after the confession so made to her, sent for and informed C., a neighbor, who then had an interview alone with A., and asked her questions upon the subject, but he held out no inducements, and A. then made a confession to C. *Held*

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(1) 2 Hale, 285; R. v. Warringham, 2 Den. 447; Warwickshall's case, 1 Leach, 263.
(2) 2 East, P. C. 659.
(3) R. v. Thompson, 1 Leach 291.
(4) R. v. Richards, 5 C. & P. 318; R. v. Hearn, C. & Mar. 109.
(5) R. v. Cass, 1 Leach, 293.
(6) R. v. Kingston. 4 C. & P. 387.
(7) R. v. Dunn, 4 C & P. 543.
(8) R. v. Thomas, 6 C. & P. 353.
(9) R. v. Walkley, 6 C. & P. 175.
(10) R. v. Partridge. 7 C. & P. 551.
(11) R. v. Warringham, *supra.*
(12) R, v. Bate, 11 Cox. 686.
(13) R. v. Fennell, 7 Q. B. D. 147; 50 L. J. (M. C.) 126.
(14) R. v. Jones, R. & R. 152; R. v. Parratt, 4 C. & P. 570.
(15) R. v. Coley, 10 Cox, 536.
(16) R. v. Baldry. 2 Den. 430; 21 L. J. (M. C.), 130; R. v. Farley, 1 Cox, 76; R. v. Harris, 1 Cox, 106.

that this second confession was so connected with the promise held out by B., as to be also inadmissible. (1)

Where a prisoner was told by A., a constable, at 10 A. M., that it would be better for him to tell the truth an admission by the prisoner to B, another constable, after 6 P.M. of the same day was not allowed to be given in evidence, although B. had, before the prisoner made the admission cautioned him not to say anything to criminate himself for that anything he would say would thereafter come in evidence against him. (2) This decision proceeded upon the ground that the caution given by B., the second constable, might not have had the effect of removing the expectation which might have been raised by the language of the first constable, A.

A confession made with a view, and under a hope, of being thereby permitted to turn Queen's evidence, or of obtaining a pardon, or reward, has been held inadmissible. (3) And this is clearly so where such hope is the reasonable result of a communication from, or the conduct of a person in authority. (4)

To exclude evidence of a confession made under the influence of a promise or threat, the promise or threat must be of a description which may be presumed to have such an effect on the mind of the prisoner as to induce him to confess; and therefore an exhortation, admonition, promise or threat proceeding, at a prior time, from some one not concerned in the apprehension, prosecution or examination of the prisoner, but interfering without authority, will not be sufficient to render a confession inadmissible. (5)

It was stated in one case to be the opinion of the judges that evidence of any confession is receivable, unless there has been some inducement held out by some person, who has authority, and that if a person who as no authority holds out to the accused party an inducement to confess, this will not exclude the confession made to that party. (6) But where such a person, held out an inducement to a defendant in the presence of the wife of the prosecutor, and the prosecutor's wife expressed no dissent to the inducement so held out, it was held that evidence of a confession then made by the defendant was not receivable (7). And where the prisoner was taken by the constable to an Inn and the Innkeeper, in the constable's hearing, held out an inducement to him to confess, and the prisoner, in the constable's hearing, made a confession to the Innkeeper, which the constable was called to prove, Alderson, B. thought the evidence inadmissible. (8)

Where A one of two defendants charged with larceny said to B., the other defendant,—in the presence of C., a constable, and D., the owner of the property,—"you had better tell Mr C. the truth," neither C., nor D. saying anything, a confession made thereupon, by B., was held admissible. (9)

Where a girl, being arrested for the murder of her child was left by the constable in the custody of a woman who told her she had better tell the truth, or it would be upon her, and the man would go free; upon which she made a confession, it was held by Parke, J., and Taunton, J., that this confession was

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(1) R. v. Rae, 13 Cox, 209.

(2) R. v. Doherty 13 Cox 23, 24.

(3) R. v. Hall, 2 Leach 559.

(4) R. v. Gillis, 11 Cox, 69. See R. v. Bailey, 2 Stark. Ev. 53; R. v. Boswell, C. & Mar. 584

(5) R. v. Rowe, R. & R. 153; R. v. Hardwick, 1 Phil. Ev. 410; R. v. Gibbons, 1 C. & P. 97; R. v. Tyler, 1 C & P. 129; R. v. Clewes, 4 C. & P. 221.

(6) R. v. Sarah Taylor, 8 C. & P. 733.

(7) *Id.*; R v. Spencer, 7 C. & P. 776; R. v. Hewett, C. & Mar. 534; R. v. Garner, 1 Den. 329; 2 C. & K. 920; 18 L. J. (M. C.) 1; R. v. Luckhurst, Dears. 245; 23 L. J. (M. C.) 18.

(8) R. v. Pountney, 7 C. & P. 302. See R. v. Slaughter, 4 C. & P. 544; R. v Laugher, 2 C. & K. 225.

(9) R. v. Parker, L. & C. 42; 30 L. J. (M. C.) 144.

not receivable, as it was made in consequence of an inducement held out to the prisoner by a person who had her in custody. (1)

A., a woman in custody on a charge of murder was placed in a room, alone with B., a "searcher" of female prisoners, having no other duties or authority in the gaol except that of searching. Whilst the search was being made A. said, to B., "If I tell the truth, shall I be hung?" to which B. answered, "No: nonsense; you will not be hung." It was held that a statement made by A. to B., immediately afterwards was not admissible. (2)

Confessions obtained from a servant through hopes held out and threats made by the *wife* or by the *relations* and neighbors of her master and prosecutor, or by the wife or relations or neighbors of any one of several persons who are in partnership, the offence being committed against the partnership concern, have been held by all the judges to be inadmissible. (3) But this does not apply to a case where the charge against the servant has no relation to the persons or property of the master or his family, as for instance, a case of child murder or concealment of birth. (4)

The inducement must refer to a temporal benefit. Hopes which are referable to a future state merely are not within the principle which renders a confession obtained by improper influence inadmissible. (5)

Thus where a prisoner, under fourteen years of age was arrested on a charge of murder and was spoken to by a man who was present at the time of the arrest, as follows; "Now, kneel down, I am going to ask you a very serious question, and I hope you will tell me the truth in the presence of the Almighty," and the prisoner, in consequence, made a statement, it was held admissible. (6)

Where a defendant being in custody charged with setting fire to her masters farm-building, was spoken to by her master's married daughter, as follows; "I am very sorry for you. You ought to have known better. Tell me the truth whether you did it or no," and the defendant replied, "I am innocent," whereupon her questioner said "Don't run your soul into more sin, but tell the truth;" it was held that a confession thereupon made was admissible. (7)

The object of the rule relating to the exclusion of confessions is to exclude all confessions which may have been procured by the prisoner being led to suppose that it will be better for him to admit himself to be guilty of an offence, which he really never committed. (8)

The proper question to be determined, therefore, is whether the inducement held out to the prisoner was calculated to make his confession an *untrue* one. (9) If not it will be admissible. Thus, where a prisoner asked of a witness with whom he was conversing whether he had better confess, and the witness replied that he had better not confess, but he might say what he had to say to him, for it should go no further, a statement thereupon made by the prisoner was held admissible. (10) And where a prisoner was taken before a Magistrate on a charge of forgery and the prosecutor said in the prisoner's hearing that he considered the prisoner the tool of G., and the Magistrate then told the prisoner to be sure to tell the truth, and upon this the prisoner made a statement, this statement was held receivable in evidence. (11)

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(1) R. v. Enoch, 5 C. & P. 539.
(2) R. v. Windsor, 4 F. & F. 361.
(3) R. v. Warringham, 2 Den. 447: R. v. Simpson, 1 Mood. C. C. 410; R. v. Upchurch, 1 Mood. C. C. 465.
(4) R. v. Moore, 2 Den. 522: 21 L. J. (M. C.) 199.
(5) R. v. Gilham, R. & M., C. C. 186.
(6) R. v. Wild, 1 Mood. C. C. 452.
(7) R. v. Sleeman, Dears. 249; 23 L. J. (M. C.) 19.
(8) *Per* Littledale, J., in R. v. Court, 7 C. & P. 485.
(9) *Per* Coleridge, J., in R. v. Thomas, 7 C. & P. 345.
(10) R. v. Thomas 7 C. & P. 345.
(11) R. v. Court, 7 C. & P., 486.

Where the Magistrate after the examination of the witnesses said to the prisoner. " Be sure you say nothing but the truth, or it will be taken against you, and may be given in evidence against you at your trial," the prisoner's statement was held admissible. (1)

Where one of the prisoner's employers having called the prisoner up into his private room said, " I think it right that I should tell you that besides being in the presence of my brother and myself you are in the presence of two police officers ; and I should advise you that to any questions that may be put to you you will answer truthfully, *so that if you have committed a fault you may not add to it by stating what is untrue*," and having shewn him a letter which he denied having written, added : " Take care, we know more than you think we know," and the prisoner thereupon made a confession, it was held that such confession was admissible. (2)

So, where the mother of a little boy in custody on a criminal charge said to him and another little boy also in custody on the same charge, in the presence of the latter's mother and of the policeman, " you had better, *as good boys*, tell the truth," whereupon both boys confessed, it was held that the confession was clearly admissible. (3) In this case, as well as in R. v. Jarvis, *supra*, the inducements appear to amount merely to a moral exhortation, and not to refer to a temporal benefit.

It was in a recent case held by A. L. Smith, J., although a person who is suspected of a crime may, before he is charged or is in custody be asked what he has to say in answer to or explanation of the matter, yet after he is in custody the police have no right to ask him questions and an admission or confession obtained in that way is inadmissible in evidence. (4)

Where a prisoner is willing to make a statement it is the magistrate's duty to receive it but before doing so, he ought to get rid entirely of any impression that may have been on the prisoner's mind that the statement may be used for his own benefit, and to tell him, as provided by Article 591, *ante*, that what he thinks fit to say will be taken down, and may be used against him on his trial.

A letter given by a prisoner to the gaoler to put into the post, is evidence against him. (5) But where the prosecution tendered, in evidence, a letter written by the prisoner, while in custody, to his wife, and given by him to a constable for the purpose of being posted, the constable instead of posting having detained it, Kelly, C. B, refused to admit it, on the ground, apparently, that the letter, in reality, belonged to the wife, who could not have been called upon to produce it, had it reached her hands as intended by the prisoner. (6) Such a letter would still be protected, although a wife is now a competent witness, under section 4 of the Canada Evidence Act 1893 ; for that section contains a proviso declaring that, " no wife shall be competent to disclose any communication made to her by her husband during their marriage."

When the prisoner has been duly cautioned by the Magistrate, in pursuance of article 591, anything said by him, thereupon, is admissible in evidence against him on his trial, although at some time previous to such caution by the Magistrate, there may have been a promise or threat held out to him to induce him to confess. (7)

Where a prisoner was indicted in Quebec, for arson, it was held that his

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(1) R. v. Holmes, 1 C. & K. 248.
(2) R. v. Jarvis, L. R. 1 C. C. R , 96 ; 37 L. J. (M. C.) 1.
(3) R. v. Reeve, L. R., 1 C.C.R., 362 ; 41 L. J. (M. C.) 92.
(4) R. v. Gavin, 15 Cox, 656.
(5) R. v. Dorrington, 2 C. & P. 418.
(6) R. v. Pamenter, 12 Cox, 177.
(7) R. v. Bate, 11 Cox, 686.

deposition taken on oath at a previous enquiry, before the Fire Commissioners into the cause of the fire, was admissible as evidence against him. (1)

By the Canada Evidence Act 1893, it is now provided that "No person shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, (etc.); provided, however, that no evidence so given shall be used or receivable in evidence against such person in any criminal proceeding thereafter instituted against him, other than a prosecution for perjury in giving such evidence."

What a prisoner has been overheard to say to another or to himself is equally admissible; though it is a species of evidence to be acted on with much caution, as being liable to be unintentionally misrepresented by the witnesses (2)

In all cases, the whole confession should be proved; for it is a general rule, that the whole of the account which the party gives of a transaction must be taken together; and his admission of a fact disadvantageous to himself shall not be received without receiving at the same time his contemporaneous assertion of a fact favorable to him. (3)

A man's confession is only evidence against himself, and not against his accomplices; (4) unless the confession is one made in the presence of the accomplices, and when the prisoners were not before a Magistrate, in which case it would be evidence, although of doubtful value, against the accomplices, and that even although the accomplices made no observation upon it. (5).

If however, two prisoners were before a Magistrate at the time when the confession was made by one of them, charging the other, the mere fact that the latter did not deny the charge would not render the confession evidence against him; although if he himself in his own statement before the Magistrate made an express reference to the confession of his fellow prisoner such reference might have the effect of rendering the confession admissible as against him. (6)

The dying declarations of a *felo de se* were held by the judges to be good evidence against a person indicted for assisting the deceased in his self-murder: and the majority of the judges were of opinion that this evidence would of itself be sufficient to convict, although the testimony of the accomplice, if living, would not unless be corroborated by other evidence. (7) This case is no infringement of the general rule that a man's confession is no evidence against his accomplice; for an accomplice is admissible as a *witness* against his fellows, and a dying declaration made by a person who, if alive, would be admissible as a witness, is admissible as evidence where the death of the deceased is the subject of the charge, and the cause of the death the subject of the dying declaration. (8)

In cases of conspiracy and of treason in compassing the Queen's death, etc., anything said or written by one of the accomplices, not as a confession simply, but for the purpose of furthering the common design, is admissible evidence against the others. (9)

593. Evidence for the defence.—After the proceedings required by section five hundred and ninety-one are completed the accused shall be asked if he wishes to call any witnesses.

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(1) R. v. Coote, L. R., 4 P. C. 599; 42 L. J. (*Priv. Counc.*), 45.
(2) R. v. Simons, 6 C. & P. 540.
(3) 4 Taunt. 245. And see the Queen's Case, 2 Brod. & B. 294.
(4) 1 Hale, 585; 2 Hawk. P. C., c. 46, s. 3; R. v. Tong, Kel. 17, 18; R. v. Boroski, 3 St. Tr. 474.
(5) 1 Phil. Ev. 400.
(6) 3 Russ. Cr. & M. (*by Greaves*), 4 Ed. 423.
(7) R. v. Tinckler, 1 East, P. C. 354.
(8) Arch. Cr. Pl. & Ev., 21 Ed. 274.
(9) R. v. Watson, 2 Stark, 140.

2. Every witness called by the accused who testifies to any fact relevant to the case shall be heard, and his deposition shall be taken in the same manner as the depositions of the witnesses for the prosecution.

Under this Article the Magistrate is obliged to take, at the preliminary investigation, the examinations of the prisoner's witnesses as well as those of the witnesses for the prosecution.

Mr. Greaves, in his report to the Lord Chanceller of England, upon Criminal Procedure, criticised the law as it stood, at that time, (1855), with regard to the *discretion* of the justices to examine witnesses for the prisoner, and strongly expressed himself in favor of Magistrates being *compelled* to take the examinations of witnesses tendered for the defendant. In the course of his remarks upon the subject, he says :

" It is difficult to imagine a greater act of injustice than that a man should be committed or bound over in a case where he has evidence so clear and conclusive that no person can for a moment doubt his innocence. And, it not unfrequently happens that, whilst an innocent man is unjustly imprisoned, the guilty is afforded an opportunity of escaping.

" The following is an instance of both these inconveniences :

" A person of the name of Yarmouth was shot and robbed, but lingered some months before he died. Bowen was taken before the Magistrates, as the perpetrator of the crime and, in his defence offered to call sundry witnesses to prove an alibi. The Magistrates, however, declined to examine them, and committed him to gaol. There he lay till after Yarmouth's death ; which did not occur till after one or two Assizes. He was then tried for the murder ; and his witnesses gave so clear an account of where he was at the time of the murder, that, after some only of them had been examined, the judge stopped the case, and directed an acquittal. The same witnesses also gave evidence as to the person who really committed the murder, which if it had been taken by the Magistrates, might have led to his apprehension. The delay, however, which took place had enabled him to leave the country ; and the result was that the guilty escaped, and the innocent lay in gaol for months. (1)

" Again, if the defense of the prisoner be false, it is essential to the ends of justice that the witnesses for him should have been examined before the Magistrates, and their evidence reduced into writing. If this has been done the prosecutor may, before the trial, investigate the accuracy of their statements, and be prepared, at the trial, to contradict them, if false, or at all events a comparison between the statements made before the Justices and those in Court may afford a means of testing the truthfulness of the witnesses But if the witnesses have not been so examined, the case they come to prove generally is unknown to the prosecutor, and he has no means of meeting or even fully testing its accuracy.

" A prisoner was indicted for stealing watches at Cheltenham. When he was before the Magistrates he proposed to call a number of witnesses from London. This was not allowed, and he was committed. On the trial these witnesses were examined, and their evidence, if true, proved that the prisoner, at the time the watches were stolen, was dining at a house in London, keeping the wedding day of its occupier. Nothing was known, at the trial, on the part of the prosecution as to any of the witnesses or the house mentioned. The result was that the defence succeeded ; and shortly afterwards it was ascertained that the whole story was a fabrication, there not even being any such house in existence.

" Nothing can more clearly shew the advantage prisoners obtain, in cases where their defences are fabricated, from their witnesses not having been exa-

(1) See a nearly similar case stated by Mr. Griffin, in 8 Rep. R. C. L. C. p. 312.

mined, than the fact that the most acute prisoner's attorneys usually advise their clients to reserve their defence, for the trial, no doubt in order that the prosecution may have no opportunity of testing its truth, or bringing witnesses to contradict it.

"The present system affords prisoners every facility for fabricating whatever defence may seem at the last moment best calculated to serve their purposes. Ordinarily there is little time for such purpose before the examination before the Justices, and generally the evidence given before the Justices is presented for the first time to the prisoner, and an answer at once required to it: but if such answer is not then given the prisoner or his friends have all the time between then and the trial, with a full knowledge of the case against him, to get up any defence he can.

"It is also by no means uncommon that a prisoner is prepared to make one defence before the Justices; and that defence not being heard, there is nothing to prevent him from adopting another and different—defence on his trial. If, however, his witnessess were examined before the Justices, he must stand or fall, on the trial, by that defence, as his attempting to set up another would plainly lead to its being disbelieved."

594. Discharge of accused when no sufficient case.—When all the witnesses on the part of the prosecution and the accused have been heard the justice shall, if upon the whole of the evidence he is of opinion that no sufficient case is made out to put the accused upon his trial, discharge him; and in such case any recognizances taken in respect of the charge shall become void, unless some person is bound over to prosecute under the provisions next hereinafter contained. R.S.C., c. 174, s. 73.

When witnesses are produced and examined on the part of the prisoner, at the preliminary investigation, the proper course to be followed by the Magistrate seems to be this. If the prisoner's witnesses are believed, and their evidence, without actually contradicting the testimony of the witnesses for the prosecution, tends merely to *explain* the facts proved in support of the charge, and to thus shew the prisoners' innocence, they will thus have made out on behalf of the accused a defence which would render any further proceedings unnecessary. But if the prisoner's witnesses *contradict* those for the prosecution, in material points, the case would then be a proper one to be sent to a jury to ascertain and decide which of the two conflicting statements is the truth.

595. Prosecutor shall be allowed to be bound over to indict.—If the justice discharges the accused, and the person preferring the charge desires to prefer an indictment respecting the said charge, he may require the justice to bind him over to prefer and prosecute such an indictment, and thereupon the justice shall take his recognizance to prefer and prosecute an indictment against the accused before the court by which such accused would be tried if such justice had committed him, and the justice shall deal with the recognizance, information and depositions in the same way as if he had committed the accused for trial.

2. Such recognizance may be in the FORM U IN SCHEDULE ONE hereto, (1) or to the like effect.

3. If the prosecutor so bound over at his own request does not

(1) For Form U, see p. 573, *post*.

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.

596. Committal for trial.—If a justice holding a preliminary inquiry thinks that the evidence is sufficient to put the accused on his trial, he shall commit him for trial by a warrant of commitment, which may be in the FORM V in SCHEDULE ONE hereto, (1) or to the like effect. R.S.C., c. 174, s. 73.

597. Copies of depositions.—Every one who has been committed for trial, whether he is bailed or not, may be entitled at any time before the trial to have copies of the depositions, and of his own statement, if any, from the officer who has custody thereof, on payment of a reasonable sum not exceeding five cents for each folio of one hundred words. R.S.C., c. 174, s. 74.

598. Recognizance to prosecute or give evidence.—When any one is committed for trial the justice holding the preliminary inquiry may bind over to prosecute some person willing to be so bound, and bind over every witness whose deposition has been taken, and whose evidence in his opinion is material, to give evidence at the court before which the accused is to be indicted.

2. Every recognizance so entered into shall specify the name and surname of the person entering into it, his occupation or profession if any, the place of his residence and the name and number if any of any street in which it may be, and whether he is owner or tenant thereof or a lodger therein.

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, (2) or to the like effect, and shall be acknowledged by the person entering into the same, and be subscribed by the justice or one of the justices before whom it is acknowledged.

4. Every such recognizance shall bind the person entering into it to prosecute or give evidence (both or either as the case may be), before the court by which the accused shall be tried.

5. All such recognizances and all other recognizances taken under this Act shall be liable to be estreated in the same manner as any forfeited recognizance to appear is by law liable to be estreated by

(1) For Form V, see p. 574, *post*.
(2) For Forms W, X, and Y, see pp. 574 and 575, *post*..

the court before which the principal party thereto was bound to appear. R.S.C, c. 174, ss. 75 and 76.

6. Whenever any person is bound by recognizance to give evidence before a justice of the peace, or any Criminal Court, in respect of any offence under this Act, any justice of the peace, if he sees fit, upon information being made in writing and on oath, that such person is about to abscond, or has absconded, may issue his warrant for the arrest of such person ; and if such person is arrested any justice of the peace, upon being satisfied that the ends of justice would otherwise be defeated, may commit such person to prison until the time at which he is bound by such recognizance to give evidence, unless in the meantime he produces sufficient sureties ; but any person so arrested shall be entitled on demand to receive a copy of the information upon which the warrant for his arrest was issued. 48-49 V., c. 7, s. 9.

599. Witness refusing to be bound over.—Any witness who refuses to enter into or acknowledge any such recognizance as aforesaid may be committed by the justice holding the inquiry by a warrant in the FORM Z in SCHEDULE ONE hereto, (1) or to the like effect, to the prison for the place where the trial is to be had, there to be kept until after the trial, or until the witness enters into such a recognizance as aforesaid before a justice of the peace having jurisdiction in the place where the prison is situated : Provided that if the accused is afterwards discharged any justice having such jurisdiction may order any such witness to be discharged by an order which may be in the FORM A A in the SAID SCHEDULE, (2) or to the like effect. R.S.C., c. 174, ss. 78 and 79.

600. Transmission of documents.—The following documents shall, as soon as may be after the committal of the accused, be transmitted to the clerk or other proper officer of the court by which the accused is to be tried, that is to say, the information if any, the depositions of the witnesses, the exhibits thereto, the statement of the accused, and all recognizances entered into, and also any depositions taken before a coroner if any such have been sent to the justice.

2. When any order changing the place of trial is made the person obtaining it shall serve it, or an office copy of it, upon the person then in possession of the said documents, who shall thereupon transmit them and the indictment, if found, to the officer of the court before which the trial is to take place. R.S C., c. 174, s. 77.

601. Rule as to bail.—When any person appears before any justice charged with an indictable offence punishable by imprisonment for more than five years other than treason or an offence punishable with death, or an offence under Part IV, of this Act, and the evidence adduced is, in the opinion of such justice, sufficient to put the accused on his trial, but does not furnish such a strong presumption of guilt

(1) For Form Z, see p. 576, *post*.
(2) For Form A A, see p. 577, *post*.

as to warrant his committal for trial, the justice, jointly with some other justice, may admit the accused to bail upon his procuring and producing such surety or sureties as, in the opinion of the two justices, will be sufficient to ensure his appearance at the time and place when and where he ought to be tried for the offence; and thereupon the two justices shall take the recognizances of the accused and his sureties, conditioned for his appearance at the time and place of trial, and that he will then surrender and take his trial and not depart the court without leave; and in any case in which the offence committed or suspected to have been committed is an offence punishable by imprisonment for a term less than five years any one justice before whom the accused appears may admit to bail in manner aforesaid, and such justice or justices may, in his or their discretion, require such bail to justify upon oath as to their sufficiency, which oath the said justice or justices may administer; and in the default of such person procuring sufficient bail, such justice or justices may commit him to prison, there to be kept until delivered according to law.

2. The recognizance mentioned in this section shall be in the FORM BB in SCHEDULE ONE to this Act. (1) R.S.C., c. 174, s. 81.

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 SHEDULE ONE to this Act. (2) R.S.C., c. 174, s. 82.

603. Bail by Superior Court.—No judge of a county court or justices shall admit any person to bail accused of treason or an offence punishable with death, or an offence under Part IV. of this Act, nor shall any such person be admitted to bail, except by order of a Superior Court of Criminal Jurisdiction for the province in which the accused stands committed, or of one of the judges thereof, or, in the province of Quebec, by order of a judge of the Court of Queen's Bench or Superior Court. R.S.C., c. 174, s. 83.

604. Application for bail after committal.—When any person has been committed for trial by any justice, the prisoner, his counsel solicitor or agent may notify the committing justice, that he will, as soon as counsel can be heard, move before a Superior Court of the province in which such person stands committed, or one of the judges

(1) For Form BB, see p. 577, *post*.
(2) For Form CC, see p. 578, *post*.

thereof, or the judge of the county court, if it is intended to apply to such judge, under section six hundred and two, for an order to the justice to admit such prisoner to bail,—whereupon such committing justice shall, as soon as may be, 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.

605. **Warrant of deliverance.**—Whenever any justice or justices admit to bail any person who is then in any prison charged with the offence for which he is so admitted to bail, such justice or justices shall send to or cause to be lodged with the keeper of such prison, a warrant of deliverance under his or their hands and seals, requiring the said keeper to discharge the person so admitted to bail if he is detained for no other offence, and upon such warrant of deliverance being delivered to or lodged with such keeper, he shall forthwith obey the same. R.S.C., c. 174, s. 84.

606. **Warrant for arrest of bailed person about to abscond.**—Whenever a person charged with any offence has been bailed in manner aforesaid, it shall be lawful for any justice, if he sees fit, upon the application of the surety or of either of the sureties of such person and upon information being made in writing and on oath by such surety, or by some person on his behalf, that there is reason to believe that the person so bailed is about to abscond for the purpose of evading justice, to issue his warrant for the arrest of the person so bailed, and afterwards, upon being satisfied that the ends of justice would otherwise be defeated, to commit such person when so arrested to gaol until his trial or until he produces another sufficient surety or other sufficient sureties, as the case may be, in like manner as before.

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, (1) R.S.C., c. 174, s. 85.

FORMS UNDER PART XLV.

FROM SCHEDULE ONE.

K.—(*Section* 580.)

SUMMONS TO A WITNESS.

Canada,
Province of ,
County of .

To E. F., of , (*labourer*) :

Whereas information has been laid before the undersigned , a justice of the peace in and for the said county of , that A. B. (*&c., as in the summons or warrant against the accused*), and it has been made to appear to me upon (*oath*), that you are likely to give material evidence for (*the prosecution*) ; These are therefore to require you to be and to appear before me, on next, at o'clock in the (fore) noon, at , or before such other justice or justices of the peace of the same county of , as shall then be there, to testify what you know concerning the said charge so made against the said A. B. as aforesaid. Herein fail not.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

J. P., (*Name of county.*)

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(1) For Form DD, see p. 579, *post*.

L.—(*Section* 582.)

WARRANT WHEN A WITNESS HAS NOT OBEYED THE SUMMONS.

Canada,
Province of ,
County of .

To all or any of the constables and other peace officers in the said county of

Whereas information having been laid before , a justice of the peace, in and for the said county of , that A. B. (*&c., as in the summons*); and it having been made to appear to (*me*) upon oath that E. F. of , (*labourer*), was likely to give material evidence for (*the prosecution*), (*I*) duly issued (*my*) summons to the said E. F., requiring him to be and appear before (*me*) on , at , or before such other justice or justices of the peace for the same county, as should then be there, to testify what he knows respecting the said charge so made against the said A. B., as aforesaid; and whereas proof has this day been made upon oath before (*me*) of such summons having been duly served upon the said E. F.; and whereas the said E. F. has neglected to appear at the time and place appointed by the said summons, and no just excuse has been offered for such neglect: These are therefore to command you to bring and have the said E. F. before (*me*) on at o'clock in the (fore) noon, at , or before such other justice or justices for the same county, as shall then be there, to testify what he knows concerning the said charge so made against the said A. B. as aforesaid.

Given under (*my*) hand and seal, this day of , in the year , at , in the county aforesaid.

J. S. [SEAL.]

J. P.. (Name of county.)

M.—(*Section* 583.)

WARRANT FOR A WITNESS IN THE FIRST INSTANCE.

Canada,
Province of ,
County of .

To all or any of the constables and other peace officers in the said county of

Whereas information has been laid before the undersigned , a justice of the peace, in and for the said county of , that (*&c., as in the summons*); and it having been made to appear to

(*me*) upon oath, that E. F. of , (*labourer*), is likely to give material evidence for the prosecution, and that it is probable that the said E. F. will not attend to give evidence unless compelled to do so : These are therefore to command you to bring and have the said E. F. before (*me*) on , at o'clock in the (*fore*) noon, at , or before such other justice or justices of the peace for the same county, as shall then be there, to testify what he knows concerning the said charge so made against the said A. B. as aforesaid.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL].

J. P. (*Name of county.*)

N.—(*Section* 584.)

WARRANT WHEN A WITNESS HAS NOT OBEYED THE SUBPŒNA.

Canada,
Province of ,
County of .

To all or any of the constables and other peace officers in the said county of .

Whereas information having been laid before , a justice of the peace, in and for the said county, that A. B. (*&c., as in the summons*) ; and there being reason to believe that E. F., of in the province of , (*labourer*), was likely to give material evidence for (*the prosecution*), a writ of subpœna was issued by order of , judge of (*name of court*) to the said E. F., requiring him to be and appear before (*me*) on , at or before such other justice or justices of the peace for the same county, as should then be there, to testify what he knows respecting the said charge so made against the said A. B., as aforesaid ; and whereas proof has this day been made upon oath before (*me*) of such writ of subpœna having been duly served upon the said E. F. ; and whereas the said E. F. has neglected to appear at the time and place appointed by the said writ of subpœna, and no just excuse has been offered for such neglect : These are therefore to command you to bring and have the said E. F. before (*me*) on at o'clock in the (fore) noon, at , or before such other 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.*)

O.—(*Section* 585.)

WARRANT OF COMMITMENT OF A WITNESS FOR REFUSING TO BE SWORN OR TO GIVE EVIDENCE.

Canada,
Province of ,
County of .

To all or any of the constables and other peace officers in the county of , and to the keeper of the common gaol at , in the said county of .

Whereas A. B. was lately charged before , a justice of the peace in and for the said county of , for that (&c., *as in the summons*) ; and it having been made to appear to (*me*) upon oath that E. F. of , was likely to give material evidence for the prosecution (*I*) duly issued (*my*) summons to the said E. F., requiring him to be and appear before me on , at , or before such other justice or justices of the peace for the same county as should then be there, to testify what he knows concerning the said charge so made against the said A. B. as aforesaid ; and the said E. F. now appearing before (*me*) (*or* being brought before (*me*) by virtue of a warrant in that behalf), to testify as aforesaid, and being required to make oath or affirmation as a witness in that behalf, now refuses so to do (*or* being duly sworn as a witness now refuses to answer certain questions concerning the premises which are now here put to him, and more particularly the following) without offering any just excuse for such refusal : These are therefore to command you, the said constables or peace officers, or any one of you, to take the said E. F. and him safely to convey to the common gaol at , in the county aforesaid, and there to deliver him to the keeper thereof, together with this precept : And (*I*) do hereby command you, the said keeper of the said common gaol to receive the said E. F. into your custody in the said common gaol, and him there safely keep for the space of days, for his said contempt unless in the meantime he consents to be examined,

and to answer concerning the premises; and for your so doing, this shall be your sufficient warrant.

Given under (*my*) hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

J. P., (*Name of county.*)

P.—(*Section* 586.)

WARRANT REMANDING A PRISONER.

Canada,)
Province of ,)
County of .)

To all or any of the constables and other peace officers in the said county of , and to the keeper of the common gaol at , in the said county.

Whereas A. B. was this day charged before the undersigned , a justice of the peace in and for the said county of , for that (*&c., as in the warrant to apprehend*), and it appears to (*me*) to be necessary to remand the said A. B.: These are therefore to command you, the said constables and peace officers, or any of you, in Her Majesty's name, forthwith to convey the said A. B. to the common gaol at , in the said county, and there to deliver him to the keeper thereof, together with this precept: And I hereby command you the said keeper to receive the said A. B. into your custody in the said common gaol, and there safely keep him until the day of (*instant*), when I hereby command you to have him at , at o'clock in the (fore) noon of the same day before (*me*) or before such other justice or justices of the peace for the said county as shall then be there, to answer further to the said charge, and to be further dealt with according to law, unless you shall be otherwise ordered in the meantime.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

J. P., (*Name of county.*)

Q.—(*Section* 587.)

RECOGNIZANCE OF BAIL INSTEAD OF REMAND ON AN ADJOURNMENT OF EXAMINATION.

Canada
Province of , }
County of . }

Be it remembered that on the day of , in the year , A. B., of , (*labourer*), L. M., of . (*grocer*), and N. O., of , (*butcher*), personally came before me, , a justice of the peace for the said county, and severally acknowledged themselves to owe to our Sovereign Lady the Queen, her heirs and successors, the several sums following, that is to say: the said A. B. the sum of , and the said L. M., and N. O., the sum of , each, of good and lawful current money of Canada, to be made and levied of their several goods and chattels, lands and tenements respectively, to the use of our said Lady the Queen, her heirs and successors if he, the said A. B., fails in the condition endorsed (*or* hereunder written.)

Taken and acknowledged the day and year first above mentioned, at before me.

J. S.,

J. P., (*Name of county.*)

CONDITION.

The condition of the within (*or* above) written recognizance is such that whereas the within bounden A. B. was this day (*or* on last past) charged before me for that (*&c., as in the warrant*); and whereas the examination of the witnesses for the prosecution in this behalf is adjourned until the day of (*instant*): If therefore, the said A. B. appears before me on the said day of (*instant*), at o'clock in the (fore) noon, or before such other justice or justices of the peace for the said county as shall then be there, to answer (*further*) to the said charge, and to be further dealt with according to law, the said recognizance to be void, otherwise to stand in full force and virtue.

R.—(*Section* 589.)

CERTIFICATE OF NON-APPEARANCE TO BE ENDORSED ON THE RECOGNIZANCE.

I hereby certify that the said A. B. has not appeared at the time and place in the above condition mentioned, but therein has made a

default, by reason whereof the within written recognizance is forfeited.

J. S.,

J. P. (*Name of county.*)

S.—(*Section* 590.)

DEPOSITION OF A WITNESS.

Canada,
Province of ,
County of .

The deposition of X. Y. of , taken before the undersigned, a justice of peace for the said county of , this day of , in the year , at (*or* after notice to C. D. who stands committed for) in the presence and hearing of C. D. who stands charged that (*state the charge*). The said deponent saith on his (*oath or affirmation*) as follows : (*Insert deposition as nearly as possible in words of witness.*)

(*If depositions of several witnesses are taken at the same time, they may be taken and signed as follows :*)

The depositions of X. of , Y. of , Z. of , &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, &c., &c.*)

(*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.*)

T.—(*Section* 591.)

STATEMENT OF THE ACCUSED.

Canada,
Province of ,
County of .

A. B. stands charged before the undersigned , a justice of the peace in and for the county aforesaid, this day of

, in the year , for that the said A. B, on , at (*&c., as in the captions of the depositions*); and the said charge being read to the said A. B., and the witnesses for the prosecution, C. D. and E. F., being severally examined in his presence, the said A. B. is now addressed by me as follows: "Having heard the evidence, do you "wish to say anything in answer to the charge? You are not "obliged to say anything unless you desire to do so; but whatever "you say will be taken down in writing, and may be given in "evidence against you at your trial. You must clearly understand "that you have nothing to hope from any promise of favour, and "nothing to fear from any threat which may have been held out to "induce you to make any admission or confession of guilt, but "whatever you now say may be given in evidence against you upon "your trial, notwithstanding such promise or threat." Whereupon the said A. B. says as follows: (*Here state whatever the prisoner says and in his very words as nearly as possible. Get him to sign it if he will.*)

A. B.

Taken before me, at , the day and year first above mentioned.

J. S., [SEAL.]

J. P., (*Name of county.*)

U.—(*Section* 595.)

FORM OF RECOGNIZANCE WHERE THE PROSECUTOR REQUIRES THE JUSTICE TO BIND HIM OVER TO PROSECUTE AFTER THE CHARGE IS DISMISSED.

Canada,
Province of ,
County of .

Whereas C. D. was charged before me upon the information of E. F. that C. D. (*state the charge*), and upon the hearing of the said charge I discharge the said C. D., and the said E. F. desires to prefer an indictment against the said C. D. respecting the said charge, and has required me to bind him over to prefer such an indictment at (*here describe the next practicable sitting of the court by which the person discharged would be tried if committed*).

The undersigned E.F. hereby binds himself to perform the following obligation, that is to say, that he will prefer and prosecute an indictment respecting the said charge against the said C. D. at (*as above*).

And the said E.F. acknowledges himself bound to forfeit to the Crown the sum of $ in case he fails to perform the said obligation.

E. F.

Taken before me.

J. S.,

J. P., (*Name of county.*)

V.—(*Section* 596.)

WARRANT OF COMMITMENT

Canada,
Province of ,
County of .

To the constable of , and to the keeper of the (*common gaol*) at , in the said county of

Whereas A. B. was this day charged before me, J .S., one of Her Majesty's justices of the peace in and for the said county of , on the oath of C. D. of , (*farmer*), and others, for that (*&c., stating shortly the offence*) : These are therefore to command you the said constable to take the said A. B., and him safely to convey to the (*common gaol*) at aforesaid, and there to deliver him to the keeper thereof, together with this precept : And I do hereby command you the said keeper of the said (*common gaol*) to receive the said A. B. into your custody in the said (*common gaol*), and there safely keep him until he shall be thence delivered by due course of law.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

J. P., (*Name of county*).

W—(*Section* 598.)

RECOGNIZAECE TO PROSECUTE.

Canada,
Province of ,
County of .

Be it remembered that on the day of , in the year , C. D. of , in the of , in the said

county of , (*farmer*), personally came before me , a justice of the peace in and for the said county of , and acknowledged himself to owe to our Sovereign Lady the Queen, her heirs and successors, the sum of , of good and lawful current money of Canada, to be made and levied of his goods and chattels, lands and tenements, to the use of our said Sovereign Lady the Queen, her heirs and successors, if the said C. D. fails in the condition endorsed (*or* hereunder written).

Taken and acknowledged the day and year first above mentioned at , before me.

J. S.,

J. P., (*Name of county.*)

CONDITION TO PROSECUTE.

The condition of the within (*or* above) written recognizance is such that whereas one A. B. was this day charged before me, J. S., a justice of the peace within mentioned, for that (*&c., as in the caption of the depositions*); if, therefore, he the said C. D. appears at the court by which the said A. B. is or shall be tried * and there duly prosecutes such charge then the said recognizance to be void, otherwise to stand in full force and virtue.

X.—(*Section* 598).

COGNIZANCE TO PROSECUTE AND GIVE EVIDENCE.

(*Same as the last form, tot he asterisk,* and then thus*):—And there duly prosecutes such charge against the said A. B. for the offence aforesaid and gives evidence thereon, as well to the jurors who shall then inquire into the said offence, as also to them who shall pass upon the trial of the said A. B., then the said recognizance to be void, or else to stand in full force and virtue.

Y.—(*Section* 598).

COGNIZANCE TO GIVE EVIDENCE.

(*Same as the last form but one, to the asterisk,* and then thus*):—And there gives such evidence as he knows upon the charge to be then and there preferred against the said A. B. for the offence aforesaid, then the said recognizance to be void, otherwise to remain in full force and virtue.

Z.—(*Section* 599.)

COMMITMENT OF A WITNESS FOR REFUSING TO ENTER INTO THE RECOGNIZANCE.

Canada,
Province of ,
County of .

To all or any of the peace officers in the said county of and to the keeper of the common gaol of the said county of , at in the said county of .

Whereas A. B., was lately charged before the undersigned (*name of the justice of the peace*), a justice of the peace in and for the said county of , for that (*&c., as in the summons to the witness*), and it having been made to appear to (*me*) upon oath that E. F., of , was likely to give material evidence for the prosecution. (I) duly issued (*my*) summons to the said E. F., requiring him to be and appear before (*me*) on , at or before such other justice or justices of the peace as should then be there, to testify what he knows concerning the said charge so made against the said A. B. as aforesaid; and the said E. F. now appearing before (*me*) (or being brought before (*me*) by virtue of a warrant in that behalf to testify as aforesaid), has been now examined before (*me*) touching the premises, but being by (*me*) required to enter into a recognizance conditioned to give evidence against the said A. B., now refuses so to do: These are therefore to command you the said peace officers, or any one of you, to take the said E. F. and him safely convey to the common gaol at , in the county aforesaid, and there deliver him to the said keeper thereof, together with this precept: And I do hereby command you, the said keeper of the said common gaol, to receive the said E F. into your custody in the said common gaol, there to imprison and safely keep him until after the trial of the said A. B. for the offence aforesaid, unless in the meantime the said E. F. duly enters into such recognizance as aforesaid, in the sum of before some one justice of the peace for the said county, conditioned in the usual form to appear at the court by which the said A. B. is or shall be tried, and there to give evidence upon the charge which shall then and there be preferred against the said A.B. for the offence aforesaid.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

J. P., (*Name of county*).

AA.—(*Section* 599.)

SUBSEQUENT ORDER TO DISCHARGE THE WITNESS.

Canada,
Province of ,
County of .

To the keeper of the common gaol at , in the county of , aforesaid.

Whereas by (*my*) order dated the day of (*instant*) reciting that A. B. was lately before then charged before (*me*) for a certain offence therein mentioned, and that E. F. having appeared before (*me*) and being examined as a witness for the prosecution on that behalf, refused to enter into recognizance to give evidence against the said A. B., and I therefore thereby committed the said E. F. to your custody, and required you safely to keep him until after the trial of the said A. B. for the offence aforesaid; unless in the meantime he should enter into such recognizance as aforesaid; and whereas for want of sufficient evidence against the said A. B., the said A. B. has not been committed or holden to bail for the said offence, but on the contrary thereof has been since discharged, and it is therefore not necessary that the said E. F. should be detained longer in your custody: These are therefore to order and direct you the said keeper to discharge the said E. F. out of your custody, as to the said commitment, and suffer him to go at large.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

J. P, (*Name of county.*)

BB.—(*Section* 601.)

RECOGNIZANCE OF BAIL.

Canada,
Province of ,
County of .

Be it remembered that on the day of , in the year , A. B. of , (*labourer,*) L. M. of , (*grocer*), and N. O. of , (*butcher*), personally came before (*us*) the undersigned, (*two*) justices of the peace for the county of , and severally acknowledged themselves to owe to our Sovereign Lady the Queen, her heirs and successors, the several sums following, that is to say: the said A. B. the sum of , and the said L. M. and N. O. the sum of , each, of good and lawful current money of Canada, to be made and

levied of their several goods and chattels, lands and tenements respectively; to the use of our said Sovereign Lady the Queen, her heirs and successors, if he, the said A. B., fails in the condition endorsed (*or* hereunder written).

Taken and acknowledged the day and year first above mentioned, at before us.

J. S.,
J. N.,

J. P., (*Name of county.*)

CONDITION.

The condition of the within (*or* above) written recognizance, is such that whereas the said A. B. was this day charged before (*us*), the justices within mentioned for that (*&c., as in the warrant*); if, therefore, the said A. B. appears at the next court of oyer and terminer (*or* general gaol delivery *or* court of General or Quarter Sessions of the Peace) to be holden in and for the county of , and there surrenders himself into the custody of the keeper of the common gaol (*or* lock-up house) there, and pleads to such indictment as may be found against him by the grand jury, for and in respect to the charge aforesaid, and takes his trial upon the same, and does not depart the said court without leave, then the said recognizance to be void, otherwise to stand in full force and virtue.

CC.—(*Section* 602.)

WARRANT OF DELIVERANCE ON BAIL BEING GIVEN FOR A PRISONER ALREADY COMMITTED.

Canada,
Province of ,
County of ,

To the keeper of the common gaol of the county of at , in the said county.

Whereas A. B. late of , (*labourer*), has before (*us*) (*two*) justices of the peace in and for the said county of , entered into his own recognizance, and found sufficient sureties for his appearance at the next court of oyer and terminer or general gaol delivery (*or* court of General or Quarter Sessions of the Peace), to be holden in and for the county of , to answer our Sovereign Lady the Queen, for that (*&c., as in the commitment*), for which he was taken and committed to your said common gaol: These are therefore to command you, in Her Majesty's name, that if the said A. B. remains in your custody in the said common gaol for

the said cause, and for no other, you shall forthwith suffer him to go at large.

Given under our hands and seals, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]
J. N., [SEAL.]

J. P., (Name of county.)

DD.—(*Section* 607.)

GAOLER'S RECEIPT TO THE CONSTABLE FOR THE PRISONER.

I hereby certify that I have received from W. T., constable, of the county of , the body of A. B., together with a warrant under the hand and seal of J. S., Esquire, justice of the peace for the said county of , and that the said A. B. was sober, (*or as the case may be*), at the time he was delivered into my custody.

P. K.,

Keeper of the common gaol of the said county.

PART XLVI.

INDICTMENTS.

"The draft Code next deals with the subject of indictments, the object being to reduce them to what is really necessary for the purposes of justice. The law at present, is in the form of objectionable written rules, qualified by several wide exceptions, which modify some of their defects.

These general rules require the greatest minuteness in many matters, which need not be referred to here.

Two rules, however, may be specially mentioned;

1st. Indictments must not be double and cannot be in the alternative; each count must charge one offence and no more:

2nd. All material averments must be proved as laid.

Although these rules have been considerably relaxed in practice, the effect of them is that indictments run to a most inordinate length, and become at once so long and so intricate that it is hardly possible to understand them, and, that practically no one reads them but the counsel who draw and the clerks who copy them.

The method employed is to take a section of an Act of Parliament and draw a series of counts, each charging one of the offences which the section creates; and as a single section often creates many offences hardly differing from each other, except by very slight shades of meaning, counts are inordinately multiplied in this manner. For instance, in R. v. Sillem, (1) an information, (which might have been an indictment), charged certain persons, in substance, with having equipped for the Confederate States, then at war with the United States, a ship called the "Alexandra." The information was framed upon 59 Geo. 3 c. 69, and contained 95 counts. The first count charged an *equipping* with intent that the ship should be employed by certain foreign states, styling themselves the *Confederate* States, with intent to cruise against the Republic of the United States. The second count, instead of the *Republic* of the United States, mentioned the *citizens of the Republic* of the United States. The third count omitted all mention of the Confederate States, and called the United States the Republic of, &c. The fourth count was like the third, with the exception of returning to the expression "*citizens*," &c. After giving various names to the United States and Confederate States in the first eight counts, eight other counts were added substituting "*furnish*" for '*equip.*" Eight more substituted "*fit out*" for "*furnish.*" In short, the indictment contained a number of counts obtained by combining every operative verb of the section on which it was founded with all the other operative words.

The excessive stringency of the rules on the subject of indictments has been greatly, though somewhat capriciously, relaxed by a variety of statutes, of which 14 and 15 Vict., c. 100 is perhaps the most extensive. By their provisions the necessity for excessive particularity is done away with, in some cases, but is left untouched in others. Thus, for instance, it is sufficient in an indictment for murder to charge that A wilfully, feloniously, and of his malice aforethought did kill and murder B., instead of setting out, as was formerly necessary, the precise manner in which the murder was committed. If the charge is not murder but obtaining goods by false pretences, the particular false pretence used must be stated, and must be proved as laid, and a proper averment that it was false to the knowledge of the accused must be introduced. It is quite impossible to assign any reason why indictments for murder should be drawn on one principle, and indictments for false pretences on another. The explanation is that the inconvenience of the principle, which used to apply to both cases, happened to attract notice in the one case, and to escape notice in the other. We propose to deal with this matter, not by making any further exceptions to the rules now in force as to indictments, but by altering the rule itself, and substituting for it the rule stated in section 482, the most important part of which is in these words:

"Every count of an indictment shall contain and shall be sufficient if it contains in substance a statement that the accused has committed some offence therein specified. Such statement may be made in

(1) R. v. Sillem, 2 H. & C. 431.

popular language without any technical averments or any allegation of matter not essential to be proved. (1)

We make, in other sections, a variety of provisions which we hope will render all future indictments perfectly simple, though sufficient to define the matter to be tried, and to form the basis of a record of the trial." Eng. Commrs' Rep.

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.

"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." (Article 3 (*l*), *ante*.)

An indictment is a written accusation of crime preferred, in the name of Her Majesty, to, and found, upon oath, by a Grand Jury competent by law to find it. When first drawn and placed before the Grand Jury, it is called a *Bill*, and is only properly termed an indictment, when it has been found by them.

The office of the indictment is to inform the accused of the charge which he is called upon to answer; and, subject to the exceptions made by Articles 553, 555, and 560, it must be preferred in the county, district, or other Magisterial Jurisdiction in which the offence charged by it has been committed.

See comments under Article 553, *ante*, pp. 531-533.

609. Statement of venue.—It shall not be necessary to state any venue in the body of any indictment, and the district, county or place named in the margin thereof, shall be the venue for all the facts stated in the body of the indictment; but if local description is required such local description shall be given in the body thereof. R.S.C., c. 174, s. 104.

The *venue* is the marginal statement, at the commencement of the Indictment, of the County or District, in which it is preferred, thus:

"County (*or* District) of , to wit,"

The provision contained in the above Article was originally taken from the Imperial statute 14 & 15 Vict. c. 100, sec. 23; before the passing of which it was essential to the validity of an indictment that, besides the general statement of *venue* in the margin, the *special venue* that is, the statement in the body of the indictment, of the place (town, parish, hamlet, village, etc.,) where the offence was committed, must have been such as in strictness, the jury who were to try the cause should have come from.

It will be seen that the above Article contains a clause, as did the 14 & 15 Vic. c. 100, s. 23, which provides that if *local* description is required, such local description shall be given in the body of the indictment. The following are mentioned by Archbold. (21 Ed. p. 57) as some of the cases in which local description has been held to be required to be inserted in the body of the indictment, namely, burglary; (2) house-breaking; (3) stealing in a dwelling-house; (4) being

(1) A provision like this is contained in article 611, *post*.
(2) 2 Russ. Cr. & M. (by Greaves), 4 Ed. 47; R. v. St. John 9 C. & P. 40.
(3) R. v. Bullock, *cit.* 1 Moo. C. C. 324.
(4) R. v. Napper, 1 Moo. C. C. 44.

found by night armed with intent to break into a dwelling-house, etc., and to commit an indictable offence therein ; (1) sacrilege ; (2) riotously demolishing churches, houses, machinery, etc. ; (3) maliciously firing a dwelling-house ; (4) forcible entry ; (5) poaching ; (6) nuisances to highways ; (7) malicious injuries to seabanks, mill dams, or other local property. (8)

It will be seen that by Article 613 (*g*) no count of an indictment is to be deemed objectionable or insufficient on the ground that it does not name or describe, with precision, any person, place, or thing. And Article 982, *post*, provides that the several forms in schedule one, varied to suit the case, or forms to the like effect are to be deemed good and sufficient.

610. Heading of indictment.—It shall not be necessary to state in any indictment that the jurors present upon oath or affirmation.

2. It shall be sufficient if an indictment begins in one of the FORMS EE in SCHEDULE ONE hereto, or to the like effect. (9)

3. Any mistake in the heading shall upon being discovered be forthwith amended, and whether amended or not shall be immaterial.

611. Form and contents of counts.—Every count of an indictment shall contain, and shall be sufficient if it contains, in substance a statement that the accused has committed some indictable offence therein specified.

2. Such statement may be made in popular language without any technical averments or any allegations of matter *not essential to be proved.*

3. Such statement may be in the words of the enactment describing the offence or declaring the matter charged to be an indictable offence, or in any words *sufficient to give the accused notice of the offence with which he is charged.*

4. Every count shall contain so much detail of the circumstances of the alleged offence as is sufficient to give the accused reasonable information as to the act or omission to be proved against him, and to identify the transaction referred to : Provided that the *absence* or *insufficiency* of *such details shall not vitiate the count.*

5. A count may refer to any section or subsection of any statute creating the offence charged therein, and in estimating the sufficiency of such count the court shall have regard to such reference.

6. Every count shall in general apply only to a single transaction.

Form FF in Schedule One gives examples of the manner of stating offences in indictments. (See p. 599 *post.*)

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(1) R. v. Jarrald, L. & C. 301 ; 32 L. J. (M. C.) 258.
(2) Arch. Cr. Pl 365.
(3) R. v. Richards, 1 M. & Rob. 177.
(4) R. v. Woodward, 1 Moo. C. C. 323.
(5) 2 Leon., 186.
(6) R. v. Ridley, R. & R. 515.
(7) R. v. Steventon, 1 C. & K. 55.
(8) 1 Tayl. Ev. 7 Ed. 268.
(9) For Form EE, see p. 598 *post*

Under this Article, 611, it is necessary that the indictment should contain a statement showing that the person therein accused has committed some indictable offence.

The manner of stating the crime is of no importance: but it is absolutely necessary that the indictment should contain, in substance, a statement showing that the person therein accused has committed an indictable offence; and if there be any defect, in or any necessary ingredient of the offence omitted from the indictment, the defendant may avail himself of the defect or omission, by demurrer or motion to quash under Article 629 *post*, or by motion in arrest of judgment, under Article 733, *post*. Thus, in an indictment for assaulting an officer whilst executing process, without showing that he was an officer of the Court out of which the process issued: (1) for contemptuous or disrespectful words to a Magistrate,—without showing that the Magistrate was in the execution of his duty at the time; (2) against a public officer for nonperformance of a duty,—without showing that he was such an officer as was bound by law to perform that particular duty; (3) the indictment, in all these and the like cases, is bad. (4)

In an indictment for neglecting to provide sufficient sustenance for a child of tender years was held to be sufficient when it avered that it was the duty of the accused to provide and that he unlawfully *neglected* to provide, and that the omission to state that the accused had the ability to provide did not vitiate the indictment, but that the ability to provide was implied and therefore sufficiently avered by the averment of *neglect*. (5)

When there is an exception contained in the same clause of the enactment which creates the offence, the indictment must shew negatively that the defendant does not come within the exception. (6) And the rule is the same although the enactment may be such as to cast upon the defendant the burden of proving that he comes within the exception. (7) It seems however that if the exception or proviso be in a subsequent clause or statute, (8) or although in the same section, yet if it be not incorporated with the enacting clause by any words of reference, (9) it is in that case matter of defence for the defendant, and not to be negatived in the indictment.

Where the enactment makes the doing of an act "without lawful authority or excuse" criminal, it is sufficient if the indictment negatives "lawful excuse" without also negativing "lawful authority," inasmuch as there can be no "lawful authority" which would not also be a "lawful excuse," and therefore to negative "lawful excuse" is also to negative "lawful authority. (10)

612. Offences may be charged in the alternative.—A count shall not be deemed objectionable on the ground that it charges in the alternative several different matters, acts or omissions *which are stated in the alternative in the enactment describing any indictable offence* or declaring the matters, acts or omissions charged to be an indictable offence, or on the ground that it is double or multifarious:

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(1) R. v. Osmer, 5 East, 304; See R. v. Everett, 8 B. & C. 114.
(2) R. v. Lease Andr. 216.
(3) 5 T. R. 623.
(4) See R. v. Cheere, 7 D. & R. 461; 4 B. & C. 902; 1 B. & Ad. 861; 8 A. & E. 481.
(5) R. v. Ryland, L. R. 1 C. C. R. 99; 37 L. J. (M. C.) 10.
(6) Spieres v. Parker, 1 T. R. 141; R. v. Earnshaw, 15 East 456; R. v. Jarvis, 1 East, 643; R. v. Pratten, 6 T. R. 559. See R. v. Baxter, 5 T. R. 83; 2 East P. C. 782; R. v. Masters, 1 B. & Ald. 362; R. v. Pearce, R. & R. 174; R. v. Robinson, R. & R. 321.
(7) R. v. Harvey L. R. 1 C. C. R. 284; 40 L. J. (M. C.) 63.
(8) R. v. Hall, 1 T. R. 320.
(9) Steel v. Smith, 1 B. & Ald. 94.
(10) R. v. Harvey, *supra*.

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 a count.—No count shall be deemed objectionable or insufficient on any of the following grounds; that is to say :

(*a.*) that it does not contain the name of the person injured, or intended, or attempted to be injured; or

(*b*). that it does not state who is the owner of any property therein mentioned; or

(*c.*) that it charges an intent to defraud without naming or describing the person whom it was intended to defraud; or

(*d.*) that it does not set out any document which may be the subject of the charge; or

(*e.*) that it does not set out the words used where words used are the subject of the charge; or

(*f*) that it does not specify the means by which the offence was committed; or

(*g.*) that it does not name or describe with precision any person, place or thing :

(*h.*) or in cases where the consent of any person, official, or authority is required before a prosecution can be instituted that it does not state that such consent has been obtained.

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. (*As amended by* 56 *Vict. c.* 32.)

An application for particulars is addressed to the judicial discretion of the presiding judge, who will exercise such discretion upon the facts, as they are made to appear before him, according to established rules and judicial usage; (1) and who, in determining whether such particulars are required or not, may have regard to the depositions. (See Art. 617, *post.*)

It should be shewn that there is reasonable necessity for more specific information; and therefore, where, in a case of embezzlement, the defendant had ample time to go over his books, which were to prove his embezzlement, his application for a bill of particulars was denied. (2)

A bill of particulars was deemed proper in the case of an indictment for

(1) *In re* Taylor, L. R., 4 Ch., 160; Doherty, v. Alman, L. R., 3 App. 728.
(2) State v. Miller, 3 N. J., L. J. 381.

embezzlement where the prisoner did not know the specific acts of embezzlement intended to be charged against him. (1)

In a case of conspiracy, where the indictment was in general terms, and did not set out the overt acts of the conspiracy, the defendant was held entitled to a bill of particulars. But the limit of the right of a defendant to a bill of particulars has been laid down, in an English Nisi Prius case, to be that, on the one hand, the particulars shall give him the same information which a special count would give; and, on the other hand, that the specific acts, with time and place, need not be stated. (2)

In a later case, before the English Court of Queen's Bench this doctrine was indirectly confirmed; and it was held, that, on a special count alleging overt acts, the Court will not order particulars to be furnished, in the absence of an affidavit by the defendant denying knowledge of the acts charged, and of sufficient information to enable him to meet them "The general principle," said Lord Coleridge, "applies only to this extent, to give such information as is sufficient to enable the defendant fairly to defend himself when in Court; but, on the other hand, not to fetter the prosecutor in the conduct of his case. (3)

It will be seen, by article 723, *post*, that if at the trial there appears to be any variance between the evidence and the charge as contained either in the indictment or in any amendement or in any particulars, the Court may order an amendment so as to make the indictment or any count in it or any such particulars conformable with the proof.

614. Indictment for treason or treasonable offences.— Every indictment for treason or for any offence against Part IV. of this Act must state overt acts, and no evidence shall be admitted of any overt act not stated unless it is otherwise relevant as tending to prove some overt act stated.

2. The power of amending indictments herein contained shall not extend to authorize the court to add to the overt acts stated in the indictment.

615. Indictments for libels.—No count for publishing a blasphemous, seditious, obscene or defamatory libel, or for selling or exhibiting an obscene book, pamphlet, newspaper or other printed or written matter, shall be deemed insufficient on the ground that it does not set out the words thereof: Provided that the court may order that a particular shall be furnished by the prosecutor stating what passages in such book, pamphlet, newspaper, printing or writing are relied on in support of the charge.

2. A count for libel may charge that the matter published was written in a sense which would make the publishing criminal, specifying that sense without any prefatory averment showing how that matter was written in that sense. And on the trial it shall be sufficient to prove that the matter published was criminal either with or without such innuendo.

See full comments on the law of libel at pp. 222-224, *ante*.

For Forms of Indictments and Pleading in Libel cases see pp. 261-262, *ante*.

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(1) R. v. Hodgson, 3 C. & P. 422; R. v. Bootyman, 5 C. & P. 300.
(2) R. v Hamilton, 7 C. & P. 448.
(3) R. v. Stapylton, 8 Cox C. C. 69. See, also, People v. McKinney, 10 Mich. 54.

See Article 614, *post*, as to special pleas to Indictments for libel.

See, also, Article 614 *ante*, and comments thereunder, as to applications for particulars.

616. Indictments for perjury, etc.—No count charging perjury, the making of a false oath, or of a false statement, fabricating evidence or subornation, or procuring the commission of any of these offences, shall be deemed insufficient on the ground that it does not state the nature of the authority of the tribunal before which the oath or statement was taken or made, or the subject of the inquiry, or the words used or the evidence fabricated, or on the ground that it does not expressly negative the truth of the words used : Provided that the court may, if satisfied that it is necessary for a fair trial, order that the prosecutor shall furnish a particular of what is relied on in support of the charge.

2. No count which charges any false pretense, or any fraud, or any attempt or conspiracy by fraudulent means, shall be deemed insufficient because it does not set out in detail in what the false pretenses or the fraud or fraudulent means consisted : Provided that the court may, if satisfied as aforesaid, order that the prosecutor shall furnish a particular of the above matters or any of them.

3. No provision hereinbefore contained in this part as to matters which are not to render any count objectionable or insufficient shall be construed as restricting or limiting in any way the general provisions of section six hundred and eleven. R.S.C., c. 174, s. 107.

For Forms of Indictment for perjury, see pp. 98, 99, *ante*.

617. Copy particulars to be supplied to the accused.—When any such particular as aforesaid is delivered a copy shall be given without charge to the accused or his solicitor, and it shall be 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, as to applications for particulars, comments, under article 613, *ante*.

618. Indictment for pretending to send money, etc., by post.—It shall not be necessary to allege, in any indictment against any person for wrongfully and wilfully pretending or alleging that he inclosed and sent, or caused to be inclosed and sent, in any post letter, any money, valuable security or chattel, or to prove on the trial, that the act was done with intent to defraud. R.S.C., c. 174, s. 113.

619. Sufficiency of indictments.—An indictment shall be deemed sufficient in the cases following :

(*a.*) If it be necessary to name the joint owners of any real or personal property, whether the same be partners, joint tenants, parceners, tenants in common, joints 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 specifyiug tbe names of such trustees or commissioners;

(*d.*) If the offence is committed in respect to any property in the occupation or under the management of any public officer or commissioner, and the property is alleged to belong to such officer or commissioner without naming him;

(*e.*) If, for an offence under section three hundred and thirty-four, the oyster bed, laying or fishery is described by name or otherwise, without stating the same to be in any particular county or place. R.S.C., c. 174, ss. 118, 119, 120, 121 and 123.

Art. 613, *ante*, provides that no count shall be insufficient for *not naming* the person injured, for *not* stating who is the owner of any property therein mentioned, nor for omitting to *name or describe* any person place or thing.

See Art. 723, *post*, as to amendment of variances so as to conform to the proof.

620. Property of a body corporate.—All property, real and personal, whereof any body corporate has, by law, the 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 three hundred and forty-three or three hundred and seventy-five of this Act, it shall be sufficient to lay the property in Her Majesty, or in any person or corporation, in different counts in such indictment; and any variance in the latter case, between the statement in the indictment and the evidence adduced, may be amended at the trial; and if no owner is proved the indictment may be amended by laying the property in Her Majesty. R.S.C., c. 174, s. 124.

For form of indictment see p. 472, *ante*.

622. Indictments in respect to postal-cards, etc.—In any indictment for any offence committed in respect of any postal card, postage stamp or other stamp issued or prepared for issue by the authority of the Parliament of Canada, or of the legislature of any province of Canada, or by, or by the authority of, any corporate body for the payment of any fee, rate or duty whatsoever, the property therein may be laid in the person in whose possession, as the owner thereof, it was when the offence was committed, or in Her Majesty if it was then unissued or in the possession of any officer or agent of the Government of Canada or of the province by authority

of the legislature whereof it was issued or prepared for issue. R.S.C., c. 174, s. 125.

See Article 3 (*v*) *ante*.

623. Indictments for thefts, etc., by public employees.—In every case of theft or fraudulent application or disposition of any chattel, money or valuable security under sections three hundred and nineteen (*c*) and three hundred and twenty-one of this Act, the property in any such chattel, money or valuable security may, in any warrant by the justice of the peace before whom the offender is charged, and in the indictment preferred against such offender, be laid in Her Majesty, or in the municipality, as the case may be. R.S.C., c. 174, s. 126.

For forms of indictment, see pp. 468, 469, *ante*.

624. Indictments for offences respecting mailable matter etc.—When an offence is committed in respect of a post letter bag, or a post letter, or other mailable matter, chattel, money or valuable security sent by post, the property of such post letter bag, post letter, or other mailable matter, chattel, money or valuable security may, in the indictment preferred against the offender, be laid in the Postmaster-General; and it shall not be necessary to allege in the indictment, or to prove upon the trial, or otherwise, that the post letter bag, post letter or other mailable matter, chattel or valuable security was of any value.

2. The property of any chattel or thing used or employed in the service of the post office, or of moneys arising from duties of postage, shall, except in the cases aforesaid, be laid in Her Majesty, if the same is the property of Her Majesty, or if the loss thereof would be borne by Her Majesty, and not by any person in his private capacity.

3. In any indictment against any person employed in the post office of Canada for any offence against this Act, or against any person for an offence committed in respect of any person so employed it shall be sufficient to allege that such offender or such other person was employed in the post office of Canada at the time of the commission of such offence, without stating further the nature or particulars of his employment. R.S.C., c. 35, s. 111.

For forms of indictment, see pp. 470 and 490, *ante*.

For meaning of "Post-letter bag," etc., see Article 4, *ante*, p. 7.

625. Indictment for theft by tenant or lodger.—An indictment may be preferred against any person who steals any chattel let to be used by him in or with any house or lodging, or who steals any fixture so let to be used, in the same form as if the offender was not a tenant or lodger, and in either case the property may be laid in the owner or person letting to hire. R.S.C., c. 174, s. 127.

For form of indictment, see p. 469, *ante*.

626. Joinder of counts.—Any number of counts for any offences whatever may be joined in the same indictment, and shall be distinguished in the manner shown in the FORM EE in SCHEDULE ONE hereto, (1) or to like effect: Provided that to a count charging murder no count charging any offence other than murder shall be joined.

2. When there are more counts than one in an indictment each count may be treated as a separate indictment.

3. If the Court thinks it conducive to the ends of justice to do so, it may direct that the accused shall be tried upon any one or more of such counts separately. Such order may be made either before or in the course of the trial, and if it is made in the course of the trial the jury shall be discharged from giving a verdict on the counts on which the trial is not to proceed. The counts in the indictment which are not then tried shall be proceeded upon in all respects as if they had been found in a separate indictment.

4. Provided that, unless there be special reasons, no order shall be made preventing the trial at the same time of any number of distinct charges of theft *not exceeding three*, alleged to have been committed *within six months* from the first to the last of such offences, whether against the same person or not.

5. If one sentence is passed upon any verdict of guilty on more counts than one, the sentence shall be good if any of such counts would have justified it.

It will be seen by this Article and by Article 612, *ante*, that it is entirely in the discretion of the court, when satisfied that the ends of justice require it, to either order a count, (when it charges several different acts), to be divided into two or more counts, or to direct, when the indictment contains several counts, that the accused be tried on one or more counts separately.

By subsection 2 of Art. 713, *post*, it is provided that if, on the trial of an indictment for murder, the evidence proves manslaughter and not murder the jury may acquit the prisoner of murder, and render a verdict of guilty of manslaughter. And if upon the trial of an indictment for child murder, the jury find the accused not guilty of the murder, they may, under Art. 714, render a verdict of concealment of birth, if the evidence is such as to warrant it.

Joinder of defendants.—Where an offence has been committed by more persons than one, all or any number of them may be jointly indicted and jointly tried for it; or each of them may be indicted and tried separately.

For instance, if several persons commit a robbery, a burglary, or a murder, they may be indicted for it either jointly, or separately; and the same where two or more commit an assault, or are guilty of extortion, or the like. (2) And although they may have acted separately, yet if the grievance or injury is the result of the acts of all jointly, all may be jointly indicted for the offence. (3)

Where money was obtained by false pretences spoken by one defendant in the presence of others, acting with him in concert together, it was held that they might all be indicted jointly. (4) So where two persons joined in singing a libellous song, it was held that they might be indicted jointly. (5) But if the

(1) For Form EE see p. 598, *post*.
(2) 2 Hale, 173; R. v. Atkinson, 1 Salk. 382.
(3) R. v. Trafford, 1 B. & Ad. 874.
(4) Young v. R. 3 T. R. 98.
(5) R. v. Benfield, 2 Burr. 985.

publications of a libel by two different persons be distinct,—as if two different booksellers, not being partners, sell the libel, at their respective shops, they must, in that case, be indicted separately; for each has committed a separate act of publication. And two or more persons cannot be indicted jointly, for perjury, or for seditious or blasphemous words, or the like, because such offences are in their nature several. (1)

Even, where several commit a joint act, which act, however is not of itself illegal, but becomes illegal merely by reason of some circumstances applicable to each individual, severally, and not jointly, they must be indicted separately. (2) Thus, several persons, who are partners, cannot be indicted jointly for the offence of exercising their trade without having served an apprenticeship. (3)

Joint and separate trials.—When several persons are indicted jointly, the prosecution have the option to try them either together, or separately. (4) The prisoners, when several are indicted jointly, caunot as a matter of right, demand to be tried separately; but the presiding judge may, in his discretion, grant them separate trials, upon good cause being shewn for a severance. (5)

627. Accessories after the fact, and receivers.—Every one charged with being an accessory after the fact to any offence, or with receiving any property knowing it to have been stolen, may be indicted, whether the principal offender or other party to the offence or person by whom such property was so obtained has or has not been indicted or convicted, or is or is not amenable to justice and such accessory may be indicted either alone as for a substantive offence or jointly with such principal or other offender or person.

2. When any property has been stolen any number of receivers at different times of such property, or of any part or parts thereof, may be charged with substantive offences in the same indictment, and may be tried together, whether the person by whom the property was so obtained is or is not indicted with them, or is or is not in custody or amenable to justice. R.S.C., c. 174, ss. 133, 136 and 138.

See Articles 715, 716 and 717, as to trial of receivers. And see, also, comments at pp. 292–296, *ante*.

628. Indictment charging previous conviction.—In any indictment for any indictable offence, committed after a previous conviction or convictions for any indictable offence or offences or for any offence or offences (and for which a greater punishment may be inflicted on that account), it shall be sufficient, after charging the subsequent offence to state that the offender was at a certain time and place, or at certain times and places, convicted of an indictable offence, or of an offence or offences, as the case may be, and to state the substance and effect only, omitting the formal part of the indictment and conviction, or of the summary conviction, as the case may be, for the previous offence, without otherwise describing the previous offence or offences. R.S.C., c. 174, s. 139.

A second offence must, in order to be punishable as such, be one which has

(1) R. v. Philips, 2 Str. 921.
(2) 2 Hawk., c. 25, s. 89.
(3) R. v. Weston, 1 Str. 623. See R. v. Tucker, 4 Burr. 2016.
(4) 2 Hawk. P. C., c. 41, s. 8.
(5) 1 Bish. Cr. Pro. 2nd Ed., s. 1018.

been committed after a conviction for a previous offence. In providing a heavier punishment for again committing an offence after being already convicted, the law proceeds upon the principle that the offender in repeating the offence is treating his previous conviction with contempt: but if the repetition of the offence takes place without his having been convicted he cannot be said to treat with contempt a conviction which has had no existence: so that each repetition of an offence before any actual conviction is dealt with as a first offence (1)

See Article 676, *post*, as to procedure. And see Article 694, *post*, as to proof of previous conviction.

For forms of indictment in such cases, see pp. 471, 491 and 492, *post*.

629. Objections to an indictment.—Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer, or motion to quash the indictment, before the defendant has pleaded, and not afterwards, except by leave of the court or judge before whom the trial takes place, and every court before which any such objection is taken may, if it is thought necessary, cause the indictment to be forthwith amended in such particular, by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared; and no motion in arrest of judgment shall be allowed for any defect in the indictment which might have been taken advantage of by demurrer, or amended under the authority of this Act.

In the Imperial Act (14 & 15 Vict. c. 100, sec. 25), from which this provision is derived, the word "*defect*" is qualified by the adjective "*formal*"; and although the word is not so qualified in the above Article, there can be no doubt that it has reference only to *formal* defects, and *imperfect* averments, and not to matters of *substance*, or to *entire omissions* of *essential* allegations. It does not mean, that,—upon the defendant demurring or moving to quash,—amendments may be made so as to cure defects or supply omissions in an indictment which does not charge any indictable offence, (2) or which charges an act that is no offence at all; (3) as, for instance, an indictment for attending a prize fight, (4) which, though an offence, is not indictable, or an indictment meant for a charge of rape, but alleging only the carnal knowledge, and omitting to state that it was *without the woman's consent*, or an indictment,—for seduction of an unmarried woman under twenty one, under promise of marriage,—omitting to state that the defendant was above the age of twenty one. (5)

If the defendant wishes to attack the indictment for defects apparent on its face, and amendable under the above Article, he must do so by demurrer or petition to quash, before pleading to the merits. He cannot do so afterwards, except by leave of the Court. Not only is he precluded by the above Article from doing so: but, under Article 734, *post*, all formal defects are cured by the verdict.

When the defects are matters of substance, the defendant may either attack them at once by demurrer or petition to quash, or he may wait till after verdict and attack them by motion in arrest of judgment under Article 733, *post*, clause 2 of which provides that the accused may, at any time before sentence, move in

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(1) See Lambe v. Hall, & Hall, Petitioner, and other cases, *cit.* at p. 433, *ante*.

(2) R. v. Bainton, 2 Str. 1088; R. v. Hewitt, R. & R. 158. R. v. Rigby, 8 C. & P. 770.

(3) R. v. Philpotts, 1 C. & K. 112.

(4) Being present at a prize fight is a non-indictable offence, punishable summarily. (See Article 95, *ante*.)

(5) See Article 182, *ante*.

arrest of judgment, on the ground that the indictment does not state any indictable offence.

The application by motion to quash an indictment is made to the Court where the bill is found ; but it has been usual, in England, in cases of indictments at sessions or in other inferior courts, to make the application to the Court of Queen's Bench, the record being previously moved there by *certiorari*. It has been decided, however, that, before plea pleaded, the Court of Quarter Sessions has itself authority to quash an indictment found there. (1)

Not only must a motion to quash be made before plea, when it is based upon formal defects, but this is also the rule even when the application is based upon any other grounds ; (2) it has, however, been held that when it is clear that an indictment has been found, without jurisdiction, the court will quash it, on motion by the defendant, after a plea to the merits. (3)

When an indictment is attacked for formal defects, by demurrer, or motion to quash, it may, under the above article, 629, be amended ; but when so attacked for defects in matters of substance, the granting of the motion to quash or the maintaining of the demurrer has the effect of setting the indictment aside ; (4) in which case, however, the prosecution may prefer a new indictment.

When there are defects in matters of substance the defendant, instead of demurring or moving to quash, may plead to the merits, and then after standing the chance of an acquittal, he may still, in case of a conviction, move in arrest of judgment, unless the defects,—though in matters of substance,—are such as are cured by the verdict, either under the provisions of article 734, *post*, (5) or under the general rule of pleading by which, when an essential averment is not wholly omitted but imperfectly stated, it will,—though so defective as to be bad on demurrer,—be cured by a verdict found upon an issue involving that averment, if the verdict is such as could only be found upon actual proof of the averment, (6) or unless the defects in the indictment have been amended by order of the Court in the course of the trial. For, although defects in matters of substance cannot be ordered to be amended, when attacked by demurrer or motion to quash, it will be seen by clause 2 of article 723, that, "If there is in the indictment or in any count in it an omission to state or a defective statement of anything requisite to constitute the offence, or an omission to negative any exception which ought to have been negatived but that the matter omitted is proved by the evidence, the Court before which the trial takes place, if of opinion that the accused has not been misled or prejudiced in his defence by such error or omission, shall amend the indictment or count as may be necessary."

When defects in substance have not been amended at the trial, under Article 723, and when they are not cured by verdict, the indictment must be set aside.

The rule with regard to defects in substance being cured by verdict will only apply to an averment *imperfectly* stated, that is, an averment which is stated, but which though stated is defective. The rule will not apply to the total omission of an essential averment.

If there is a total omission, so that the indictment charges no offence in law, the verdict is no cure. (7)

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(1) R. v. Wilson, 6 Q. B. 620 ; 14 L. J. (M. C.) 3.

(2) R. v. Rookwood, Holt, 684

(3) R. v. Heane, 4 B. & S 947 ; 33 L. J. (M. C.) 115 ; See also, R. v. James, 12 Cox 127 ; and R. v. Yates, 12 Cox 233.

(4) R. v. Burkett Andr. 230 ; R. v. Sermon, 1 Burr. 516, 543.

(5) See Nash v. R., 4 B. & S. 535 ; 33 L. J. (M. C.) 94.

(6) Heymann v. R., L. R. 8 Q. B. 105 ; R. v. Goldsmith, L. R. 2 C. C. R. 74 ; 42 L. J. (M. C.) 94 ; R. v. Stroulger, 17 Q B D. 327 ; 55 L. J. (M C.) 137.

(7) R. v. Aspinall, 2 Q. B. D. 58 ; 46 L. J. (M. C) 149. See, R. v. Gray, L. & C. 365 ; R. v. Lynch, 20 L. C. J. 187 ; R. v. Carr., 26 L. C. J., 61 ; R. v. Norton, 16 Cox, 59 ; R. v Waters, 1 Den. 356.

630. Time to plead to indictment.—No person prosecuted shall be entitled as of right to traverse or postpone the trial of any indictment preferred against him in any court, or to imparl, or to have time allowed him to plead or demur to any such indictment: Provided always, that if the court before which any person is so indicted, upon the application of such person or otherwise, is of opinion that he ought to be allowed a further time to plead or demur or to prepare for his defence, or otherwise, such court may grant such further time and may adjourn the trial of such person to a future time of the sittings of the court or to the next or any subsequent session or sittings of the court, and upon such terms, as to bail or otherwise, as to the court seem meet, and may, in the case of adjournment to another session or sitting, respite the recognizances of the prosecutor and witnesses accordingly, in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence at such subsequent session or sittings without entering into any fresh recognizances for that purpose. R.S.C., c. 174, s. 141.

The trial of an indictment will generally be postponed by the Court, upon the application of the prosecution or of the defendant, supported by affidavits shewing sufficient cause for the delay, such as the illness or unavoidable absence of a necessary and material witness, the existence of a prejudice in the jury, and the like. (1)

The production by the prosecution of evidence additional to that adduced before the Magistrate, and not communicated to the prisoner before the trial, may be a ground for postponement of the trial. (2)

The trial may be postponed, on the defendant's application, after the jury have been charged with the indictment, and before any evidence has been given in the case. (3)

Where a defendant was indicted for having carnal knowledge of a girl under ten years of age, an application by the prosecution for the postponement of the trial, with a view to the instruction of the girl, was refused. (4)

Where the application is made by the prosecutor, it is in the discretion of the Court either to detain the defendant in custody or admit him to bail, or to discharge him on his own recognizance. (5) But after a bill for a serious offence has been found, the Court will not admit the prisoner to bail. (6)

The judges of the Central Criminal Court postponed until the next session the presentment to the Grand Jury of a bill of indictment for a capital offence, upon the ground of the illness of a witness sworn to be material. (7)

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(1) See, R v. Chevalier D'Eon, 2 Burr. 1514 : R. v. Jolliffe, 4 T. R. 285 ; R. v. Morphew, 2 M. & Sel. 602 ; R. v. Streak, 2 C. & P. 413 ; R. v. Hunter, 3 C. & P. 591 ; R. v. Stevenson, 2 Leach 546 ; R. v. Bolam, 2 M. & Rob. 192 ; R v. Macarthy, C. & Mar. 625 ; R. v. Savage, 1 C. & K. 75 ; R. v. Mobbs, 2 F. & F. 18 ; R. v. Lawrence, 4 F. & F. 901 ; R. v. Langhurst, 10 Cox, 353 ; R. v. Taylor, 11 Cox, 340 ; R. v. Dripps, 13 Cox, 25 ; *cit. in* Arch. Cr. Pl. & Ev., 21 Ed. 105.

(2) R v. Flannagan, 15 Cox, 403.

(3) R. v. Fitzgerald, 1 C. & K. 201.

(4) R. v. Nicholas, 2 C. & K. 246.

(5) R. v. Beardmore, 7 C. & P. 497 ; R. v. Parish, 7 C. & P. 782 ; R. v. Osborne, 7 C. & P. 799 ; R. v. Bridgeman, C. & Mar. 271.

(6) R. v. Chapman, 8 C. & P. 558 ; R. v. Owen, 9 C & P. 83 ; R. v. Guttridge, 9 C & P. 228 ; R. v. Bowen, 9 C. & P. 509.

(7) R. v. Palmer, 6 C. & P. 652.

In one case it was held by Lush, J., that the presentment of a bill to the Grand Jury could not be postponed to the next Assizes, on the ground that other and like charges might, before that time, be brought against the prisoner. (1)

Baggallay, J. postponed, to the next assizes, the presentment of a bill, on the ground that the witnesses were resident in a workhouse where there was small-pox, and that the attendance at the Assizes of such witnesses would be dangerous to the public, inasmuch as they might carry infection; and the prisoner was admitted to bail on his own recognizance to appear at the next Assizes. (2)

See Articles 757-759, *post*, for special provisions, as to the province of Ontario.

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 of any offence of which he might be convicted on the count or counts to which such plea is pleaded, but that he may be convicted on any such count or counts of some offence or offences of which he could not have been convicted on the former trial, the court shall direct that he shall not be convicted on any such count or counts of any offence of which he might have been convicted on the former trial, but that he shall plead over as to the other offence or offences charged.

Under this Article, a plea of *autrefois convict* or of *autrefois acquit* may be proved by shewing either that the offence, of which the defendant was pre-

(1). R. v. Heeson, 14 Cox, 40.
(2). R. v. Taylor, 15 Cox, 8.

viously convicted or acquitted, was the *same* offence as that which is charged against him in the indictment pleaded to, or that he was convicted or acquitted as the case may be, of *some* offence of which he might be convicted upon the indictment pleaded to. For instance, suppose A,—having been indicted tried and convicted of the *manslaughter* of B., or of *concealing the birth* of B.,—is afterwards indicted for the *murder* of B., a plea of *autrefois convict*, setting up such previous conviction, would be a good plea, because, although it was not a conviction for murder, and therefore not the identical offence charged in the indictment pleaded to, it was a conviction for an offence of which she might be again convicted under the new indictment; for a person charged with murder may be found guilty, under Article 713, *post*, of manslaughter, or under Article 714, of concealment of birth; and Article 633, *post*, expressly declares that a previous conviction or acquittal for murder shall be a bar to a second indictment for the same homicide, charging it as manslaughter, and *vice versa*.

It is said that the true test of whether such a plea is a sufficient bar, in any particular case, is, whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction on the first. (1)

It is a well established principle of our criminal law that a series of charges shall not be preferred, and, whether a person accused of a minor offence be acquitted or convicted, he shall not be charged again on the same facts in a more aggravated form. (2)

The rule is equally applicable though the first indictment be against the defendant jointly with others, and the second against him alone, for upon such second indictment he may be convicted of an offence committed by him *separately* or jointly with the others. (3)

There must have been a former conviction or acquittal upon trial; and therefore where a Coroner's jury returned a verdict of accidental death, a defendant who was afterwards indicted for the homicide was not entitled to plead *autrefois acquit*, on the strength of the verdict of the Coroner's jury. (4)

It appears also that, as a general rule, the previous conviction or acquittal must have been valid, and that if there was any defect or insufficiency in the first indictment, or trial, so that the defendant was not *legally* liable to suffer judgment for the offence charged in the indictment, as it stood when the verdict was rendered, and was, therefore, never really placed in jeopardy, the previous conviction or acquittal will be no bar to a second indictment. (5) But this rule seems, now, to be greatly modified by the above Article, 631, which expressly declares, (see clause 5), that the defendant shall succeed on his plea of *autrefois acquit* or *autrefois convict*, "if it appear that the matter on which the accused was given in charge on the former trial is the same, *in whole or in part*, as that on which it is proposed to give him in charge, and that he might, on the former trial, if all proper amendments *had* been made,—have been convicted of all the offences of which he may be convicted on the count or counts," pleaded to.

So, that, even if the former indictment were too defective and insufficient in law to sustain a conviction, yet, if the defects were such as might have been amended, for instance, under Article 723, *post* although not actually amended,

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(1) R. v. Clark, 1 Brod. & B. 473; See also, R. v Emden, 9 East, 437; R. v. Sheen 2 C. & P. 634; R. v. Bird, 2 Den. 94; 20 L. J. (M. C.) 70; R. v. Miles, 24 Q. B. D. 423; 59 L. J. (M. C.) 56.

(2) *Per* Cockburn. C. J. in R. v. Elrington, 1 B. & S 688.

(3) R. v. Dann, 1 Mood, C C. 424.

(4) R. v. Labelle, (Q. B., Montréal, 1892), 1 Mon. Law Dig. 433; 16 L.N. 187.

(5) R. v. Drury, 3 C. & K. 190; 18 L. J. (M. C.) 189; R. v. Green, Dears. & B 113; 26 L. J. (M. C.) 17. See. also, R. v. Coogan, 1 Leach, 448; R. v Taylor, 3 B. & C. 502; R. v. Champneys, 2 M. & Rob. 26; and other cases *cit. in* Arch. Cr. Pl. & Ev. 21 Ed. 149, 150.

it seems that under clause 5 of the above Article, it would be a bar to a second indictment for the same offence.

A plea of *autrefois convict* or *autrefois acquit*, has been held to be sustained by proof of a previous conviction or acquittal by a competent tribunal in a foreign country. (1) In such a case the defendant should produce an exemplification of the record of his conviction or acquittal from the court of the State or Kingdom where he was tried. (2)

As to proof of proceedings or records of foreign courts, see section 10 of the Canada Evidence Act, 1893, *post*.

For forms of plea of *autrefois acquit*, see p. 600, *post*.

According to clause 3 of the above Article, 631, pleas of *autrefois acquit*, *autrefois convict*, and pardon, may be pleaded together, and, if pleaded, must be disposed of before the accused is called on to plead further; and when these pleas are disposed of against the defendant he may then plead not guilty.

As the jury are sworn, at once, to try the issue raised by the plea of *autrefois acquit*, or *autrefois convict* it appears that no replication is actually pleaded on the part of the Crown; although a replication and *similiter* must be entered upon the record, when afterwards made up. (3)

For form of replication, see p. 600, *post*.

Where in an English case the former record was at the Quarter Sessions, the Queen's Bench Division of the High Court granted a *mandamus* to the justices to make up the record. (4)

A verdict for the defendant upon a plea of *autrefois acquit* or *convict* cannot, it seems, be set aside, and a new trial had, although rendered without evidence and against the opinion of the judge. (5)

Plea of summary conviction or dismissal.—Analagous to the defences of *autrefois acquit* and *autrefois convict* is the defence that the defendant has been before convicted or discharged under the provisions relating to summary trials. By Articles 797, 798, and 799, it is provided, in reference to summary trials, of certain indictable offences that, "whenever the magistrate finds the offence not proved he shall dismiss the charge and make out, and deliver to the person charged, a certificate under his hand stating the fact of such dismissal," that, "every conviction under this Part shall have the same effect as a conviction upon indictment for the same offence"; and, that, "every person who obtains a certificate of dismissal, or is convicted under the provisions of this Part, shall be released from all further or other criminal proceedings *for the same cause*." And by Articles 865 and 867 *post*, relating to the summary trial of assaults, it is provided, that, "if the justice, upon the hearing of any case of assault or battery *upon the merits* where the complaint is preferred by or on behalf of the person aggrieved, under the next preceding section, deems the offence not to be proved, or finds the assault or battery to have been justified, or so trifling as not to merit any punishment, and accordingly dismisses the complaint, he shall *forthwith* make out a certificate under his hand stating the fact of such dismissal, and shall deliver such certificate to the person against whom the complaint was preferred;" and that "if the person against whom any such complaint has been preferred, by or on the behalf of the person aggrieved, obtains such certificate, or, having been convicted, pays the whole amount adjudged to be paid

(1) R. v. Hutchinson, 1 Leach, 135; Bull N. P. 245.
(2) Hutchinson's Case, 3 Keb. 785; And, see Beak v. Thyrwhit, 3 Mod. 194; 1 Show. 6; R. v. Roche, 1 Leach, 134.
(3) Arch, Cr. Pl. & Ev. 21 Ed. 151.
(4) R. v. Justices of Middlesex, 5 B. & Ad. 1113; 3 L. J. (M. C.) 32.
(5) R. v. Lea, 2 Mood. C. C. 9.

or suffers the imprisonment, or imprisonment with hard labour, awarded, he shall be released from all further or other proceedings, civil or criminal, *for the same cause.*

The certificate of dismissal can only be granted when there has been a full hearing *upon the merits.* If the certificate is granted on a withdrawal of the charge, before hearing, it will be no bar to subsequent proceedings for the same assault. (1)

The effect of the certificate of dismissal, when granted, on an acquittal, or of payment of the penalty or suffering the punishment imposed on a conviction, as the case may be, is to release the defendant from all other proceedings *for the same cause.*

A defence under these provisions must be specially pleaded.

For form of plea, see p. 600, *post.*

A summary conviction for assault has been held to be a bar to a subsequent indictment for stabbing, based on the same transaction ; (2) and it has also been held a bar to an indictment for unlawful wounding and an assault occasioning actual bodily harm, based on the same circumstances. (3)

A summary conviction for assault has, however, been held not to be a bar to a subsequent indictment for manslaughter in a case where the man, who was assaulted, afterwards died in consequence of the assault. (4)

It appears that the production of the certificate of dismissal is of itself sufficient evidence of such dismissal, without proof of the signature of the Magistrate or justice. (5)

Plea of pardon.—With regard to the plea of pardon it should be pleaded at the first opportunity the defendant has of doing so. If for instance, he have obtained a pardon before being arraigned, and, instead of then pleading it in bar, he plead the general issue he will be deemed to have named the benefit of the pardon and will not be able to avail himself of it in arrest of judgment. (6)

This however, relates to the Crown's pardon only ; for a pardon by statute need not be pleaded, unless there be exceptions in it ; (7) nor can the defendant lose the benefit of it by his *laches* or negligence.

If the Crown's pardon be obtained after the defendant has been tried, he may plead it after verdict in arrest of judgment, or, if it has been granted after sentence, he may plead it in bar of execution.

See Article 966, *post*, as to pardons by the Crown.

632. Depositions and judge's notes on former trial.—On the trial of an issue on a plea of *autrefois acquit* or *convict* the depositions transmitted to the court on the former trial, together with the judge's and official stenographer's notes if available, and the depositions transmitted to the court on the subsequent charge, shall be admissible in evidence to prove or disprove the identity of the charges.

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(1) Reed v. Nutt, 24 Q. B. D. 669.
(2) R. v. Stanton, 5 Cox 324 ; R. v. Walker, 2 M. & Rob. 446.
(3) R. v. Elrington, 1 B. & S. 688 ; 31 L. J. (M. C.) 14 ; R. v. Miles 24 Q. B. D. 423 ; 59 L. J. (M. C.) 56.
(4) R. v. Morris, L. R. 1 C. C. R. 90 ; 36 L. J. (M. C.) 84.
(5) See the Canada Evidence Act 1893, sec. 10 *post.*
(6) R. v. Norris, 1 Roll. Rep. 297 ; 2 Keb. 25.
(7) Fost. 43 ; 3 Inst. 234, 334 ; 2 Hale 252.

633. Indictment substantially charging an offence previously tried. —When an indictment charges substantially the same offence as that charged in the indictment on which the accused was given in charge on a former trial, but adds a statement of intention or circumstances of aggravation tending if proved to increase the punishment, the previous acquittal or conviction shall be a bar to such subsequent indictment.

2. A previous conviction or acquittal on an indictment for murder shall be a bar to a second indictment for the same homicide charging it as manslaughter; and a previous conviction or acquittal on an indictment for manslaughter shall be a bar to a second indictment for the same homicide charging it as murder.

634. Plea of justification to indictment for libel. — 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.

FORMS UNDER PART XLVI.

FROM SCHEDULE ONE.

EE.—(*Sections* 610 *and* 626.)

HEADING OF INDICTMENT.

In the (*name of the court in which the indictment is found*).

The jurors for our Lady the Queen present that

(*Where there are more counts than one, add. at the beginning of each count*) :

" The said jurors further present that ."

FF.—(*Section* 611.)

EXAMPLES OF THE MANNER OF STATING OFFENCES.

(*a.*) A. murdered B. at , on .

(*b.*) A. stole a sack of flour from a ship called the , at , on .

(*c.*) A. obtained by false pretenses from B., a horse, a cart and the harness of a horse at , on .

(*d.*) A. committed perjury with intent to procure the conviction of B. for an offence punishable with penal servitude, namely robbery, by swearing on the trial of B. for the robbery of C. at the Court of Quarter Sessions for the county of Carleton, held at Ottawa, on the day of , 1879 ; first, that he, A. saw B. at Ottawa, on the day of ; secondly, that B. asked A. to lend B. money on a watch belonging to C. ; thirdly, &c.

(*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*).

For Forms of Indictment, under Title II, see pp. 75–76, *ante*,

For Forms of Indictment, under Title III. see pp. 98–99, *ante*.

For Forms of Indictment, under Title IV, see pp. 128–132, *ante*.

For Forms of Indictment, under Title V, see pp. 249–262, *ante*.

For Forms of Indictment, under Title VI, see pp. 467–495, *ante*.

ADDITIONAL FORMS UNDER PART XLVI.

PLEA OF AUTREFOIS ACQUIT.

And, having heard the said indictment read here in Court, the said A. B. saith that our said Lady the Queen ought not further to prosecute the said indictment against him the said A. B.; because he saith that, heretofore, to wit, on the day of at the [*describe the Court,*] he the said A. B. was lawfully acquitted of the said offence charged in the said indictment. Wherefore he the said A. B. prays judgment and that he may be discharged from the said premises in the said indictment specified.

REPLICATION,

And hereupon J. N. [*the Clerk of the Peace, or Clerk of Arraigns,*] who prosecutes for our said Lady the Queen in this behalf, says that by reason of any thing in the said plea of the said A. B. above pleaded in bar alleged, our said Lady the Queen ought not to be precluded from prosecuting the said indictment against the said A. B.; because he says that the said A. B. was not lawfully acquitted of the said offence charged in the said indictment, in manner and form as the said A. B. hath above in his said plea alleged; And this he the said J. N. prays may be enquired of by the country.

SIMILITER.

[*The following form of similiter is added in making up the record*:

And the said A.B. doth the like. Therefore, let a jury come.

PLEA OF CONVICTION BEFORE JUSTICES.

And, having heard the said indictment read in court, the said A. B. saith that our said Lady the Queen ought not further to prosecute the said indictment against him the said A. B., in respect of the offence in the said indictment mentioned; because he saith that heretofore to wit, on the day of at

in the County (*or* "District" *etc.*) of , he the said A. B. was upon the complaint of the said C. D., *etc*, (*Reciting the information before the magistrates, in the past tense*), convicted before the said (*Names of the magistrates*) two of Her Majesty's justices of the peace in and for the said County (*or* "District" *etc*), for that he the said A. B. did on at unlawfully assault and beat the said C. D. And the said justices did then and there adjudge the said A. B. for his said offence to forfeit and pay the sum of and in default of immediate payment of the said sum of by the said A. B., they the said justices did adjudge him the said A. B. to be imprisoned for the space of two calendar months unless the said sum of should be sooner paid, the whole as more fully appears by the record of the said conviction: And the said assault and battery of the said C. D. of which the said A. B. was so convicted as aforesaid, and the wounding of the said C. D. mentioned and alleged in the said indictment are one and the same assault and battery, and not other and different. And he the said A. B. further saith that he the said A. B. hath duly paid the said sum of so adjudged by the said justices to be paid under the said conviction. Wherefore the said A. B. prays judgment, and that he may be discharged from the said premises in the said indictment mentioned.

[*If the complaint before the justices was dismissed, frame the plea accordingly.*]

REPLICATION.

And hereupon J. N. (*the Clerk of the Peace, or Clerk of Arraigns*) who prosecutes for our said Lady the Queen, in this behalf, says, that, by reason of anything in the said plea of the said A. B., above pleaded, in bar alleged, our said Lady the Queen ought not to be precluded from prosecuting the said indictment against the said A. B.; because he says that there is not any record of the said alleged conviction in manner and form as the said A. B. hath above in his said plea alleged: And this he the said J. N. prays may be enquired of by the country.

[*If the plea is based upon a dismissal of the complaint before the justices, the replication should traverse the fact of the granting of the certificate of dismissal.*]

PART XLVII.

CORPORATIONS.

635. Corporations may appear by attorney.—Every corporation against which a bill of indictment is found at any court having criminal jurisdiction shall appear by attorney in the court in which

such indictment is found, and plead or demur thereto. R.S.C., c. 174, s 155.

636. Certiorari, etc., not necessary.—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 cheif 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., 174, s. 157.

638. Proceedings on default.—If such corporation does not appear in the court in which the indictment has been found, and plead or demur thereto within the time specified in the said notice, the judge presiding at such court may, on proof to him by affidavit of the due service of such notice, order the clerk or proper officer of the court to enter a plea of "not guilty" on behalf of such corporation and such plea shall have the same force and effect as if such corporation had appeared by its attorney and pleaded such plea. R.S.C., c. 174, s. 158.

639. Trial may proceed in the absence of a corporation defendant.—The court may—whether such corporation appears and pleads to the indictment, or whether a plea of "not guilty is entered by order of the court—proceed with the trial of the indictment in the absence of the defendant in the same manner as if the corporation had appeared at the trial and defended the same; and in case of conviction, may award such judgment and take such other and subsequent proceedings to enforce the same as are applicable to convictions against corporations. R.S.C., c. 124, s. 159.

PART XLVIII.

PREFERRING INDICTMENT.

640. Jurisdiction of Courts.—Every Court of Criminal Jurisdiction in Canada is, *subject to the provisions of Part XLII.*, competent to try all offences *wherever committed*, if the accused is found or apprehended or is in custody within the jurisdiction of such court, or

if he has been committed for trial to such court or ordered to be tried before such court, or before any other court, the jurisdiction of which has by lawful authority been transferred to such first mentioned court under any Act for the time being in force : Provided that nothing in this Act authorizes any court in one province of Canada to try any person for any offence committed entirely in another province, except in the following case :

2. Every proprietor, publisher, editor or other person charged with the publication in a newspaper of any defamatory libel, shall be dealt with, indicted, tried and punished in the province in which he resides, or in which such newspaper is printed.

The words "*all offences wherever committed*" used in this Article, must be interpreted to mean offences committed wherever the criminal law of Canada extends. See comments under Article 542, *ante* ; And see, also, the case of McLeod v. Attorney General of New South Wales, and comments at pp. 211, 213, *ante*.

641. Sending bill before Grand Jury.—Any one who is bound over to prosecute any person, whether committed for trial or not, may prefer a bill of indictment for the charge on which the accused has been committed, or in respect of which the prosecutor is so bound over, or for any charge founded upon the facts or evidence disclosed on the depositions taken before the justice. The accused may at any time before he is given in charge to the jury apply to the court to quash any count in the indictment on the ground that it is not founded on such facts or evidence, and the court shall quash such count if satisfied that it is not so 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 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.

3. 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.

4. Save as aforesaid, no bill of indictment shall after the commencement of this Act be preferred in any province of Canada.

See remarks of the Royal Commissioners at pp. 527–530, *ante*.

This Article makes it clear that, in future, no one but the Attorney General can prefer an indictment which is not preceded by and based upon a preliminary examination of witnesses before a Magistrate, unless such examination is dispensed with by an order of the Court, or by the written consent of the

Attorney General or of a judge of any Court of Criminal Jurisdiction; and it gives the defendant the right to move the Court to quash any indictment, or any count of an indictment not founded upon the facts or evidence disclosed in the depositions taken before the Magistrate.

The Grand Jury.—It requires the assent of at least twelve Grand Jurors to find an indictment and put the accused on his trial; and it is usual to summon twenty-four Grand Jurors; but the number empanelled and sworn must not exceed twenty three, as otherwise a complete jury of twelve of them might find a bill, when, at the same time, a complete jury of twelve others might dissent.

Lord Denman C. J., in referring to the subject, in the case of R. v. Marsh, said, "The Court has no doubt that twenty three is the limited number. It is a matter of practice proved by authorities in the only way in which proof can be given of a point of that kind, which has been undisputed," (1)

Woolrych says, "Twelve at least must be sworn, and not more than twenty three, in order that twelve may be a majority." (2)

"As many as appear upon this panel are sworn upon the Grand Jury to the amount of twelve, at the least, and not more than twenty-three, that twelve may be a majority. (3)

Bishop says, "Twelve of the Grand Jurors must consent, in order to render a finding valid." (4)

Kennedy, in his work on juries, says: "As many as appear of those summoned are sworn upon the Grand Jury, not less than twelve, nor more than twenty-three, that a majority of twelve, at least, may be obtained; and the foreman, upon the consideration of every indictment, ought to see that twelve be agreed." (5)

Chitty says: "The Grand Jury must consist of twelve, at least, and may contain any greater number, not exceeding twenty-three, that twelve may form a majority of the jurors." (6)

"The '*Grand Jury*' must necessarily consist of twelve at least, and may contain any greater number under twenty four; the object of which is that a certain majority may always be secured. Twelve or more of them must find the bill of indictment, though it is not necessary that all above that number should agree to the bill.

The evidence having been considered, if twelve of the Grand Jury deem the charge sufficiently proved, their clerk endorses on the indictment, '*A true bill*'; if otherwise, '*No true bill.*'" (7)

After the Grand Jury are assembled, the following oath is administered to the foreman:

"You, as foreman of this Grand Inquest, for Our Sovereign Lady the Queen and the body of this county (*or* "district," *etc.*,) of shall diligently enquire, and true presentment make of all such matters and things as shall be given you in charge. The Queen's counsel, your fellows', and your own, you shall keep secret. You shall present no one through envy, hatred, or malice; neither shall you leave any one unpresented through fear, favor, affection, or hope of reward or gain; but you shall present all things truly

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(1) R. v Marsh, 6 A. & E. 242; 1 Nev. & P. 187.
(2) Woolrych, Cr. L. 42.
(3) Chase's Blackstone, 1005; Ewell's Blackstone, 566; Browne's Blackstone, 685
(4) 1 Bish. Cr. Proc. s. 854.
(5) Kennedy's Law & Prac. of Juries 116.
(6) 1 Chitty's Cr. L. 306.
(7) Cornish's Juryman's Legal Handbook, 49, 51.

and indifferently as they come to your knowledge, according to the best of your understanding: So help you God!"

The rest of the Grand Jury, by three at a time, are then sworn, as follows:

"The same oath which your foreman hath taken on his part, you and every one of you shall well and truly observe and keep on your part: So help you God!"

When the Grand Jury have been sworn, they receive a charge from the presiding judge, and are instructed generally in the duties which they have to perform; and, where any of the cases to be brought before them involve difficult points of law, these are explained to them.

The Grand Jury then retire to the grand-jury room to receive the bills of indictment to be submitted to them. As each case comes up for the Grand Jury's consideration, the witnesses are called into the Grand Jury-room, in the order in which their names appear endorsed on the indictment, and, after being sworn by the foreman, they give their evidence; and if the offence should appear to a majority (consisting of twelve at least) of the jury to have been sufficiently proved, the indictment will be endorsed "*True bill*," but "if the majority" (says Archbold) "should be of opinion that the offence has not been sufficiently proved, the words, '*No true bill*,' are in that case, endorsed on the indictment." (1)

It is a maxim of our criminal law that no man can be convicted of an indictable offence, except, as Blackstone says, "by the unanimous voice of twenty four of his equals and neighbors, that is, by twelve, at least, of the Grand Jury, in the first place, assenting to the accusation; and, afterwards, by the whole petit jury, of twelve more, finding him guilty."

Although a Grand Jury composed of any number between twelve and twenty three is a legal Grand Jury, it is the almost invariable practice to have the full number of twenty three sworn, so, that, as Mr Justice Wurtele said, at Montreal, in June 1893,—to a Grand Jury consisting of twenty three members,—twelve or more of their number must concur in *finding* or *rejecting* a bill.

Nearly all the authorities, by the tenor of their comments upon the subject, appear to assume that the Grand Jury is always composed of the full number of twenty three.

Prentice says: "If the offence appears, to a *majority* of them, consisting of twelve at least, to be sufficiently proved, the clerk of the Grand Jury will endorse on the indictment, 'true bill'; but if the *majority* should be of opinion that the offence has not been sufficiently proved, the words 'no true bill' are indorsed on the indictment" (2)

Cremazie says,—"Les jurés après avoir entendu les témoignages doivent décider sur la culpabilité de l'accusé. Pour donner cette décision il faut qu'ils soient au moins douze c'est-à-dire qu'il faut que douze jurés trouvent le prisonnier coupable ou non-coupable pour que leur décision soit valide." (3)

"After the evidence has been gone into, if a *majority*, (at least twelve) of the Grand Jury consider the charge sufficiently proved, their clerk, or the foreman will indorse on the indictment 'a true bill'; but if they consider otherwise, then 'no true bill' or 'not found.'" (4)

"The witnesses are severally called in before the Grand Jury and examined by them; and if a *majority* of the Grand Jury (amounting to twelve at the least), be of opinion that the evidence thus adduced makes out a sufficient case against the prisoner to warrant his being put upon his trial before the petty jury, the foreman endorses on the bill, '*A true bill*,' and signs his name to it '*A. B.*,

(1) Arch. Cr. Pl. & Ev. 21 Ed. 86.
(2) Prentice Cr. Pro. 116.
(3) Cremazie,—Lois Criminelles Anglaises, p. 179.
(4) Barbour's Cr. L. 668.

Foreman' But if a *majority* of the Grand Jury is of a different opinion, then the words, '*Not a true bill*' are endorsed." (1)

" When the Grand Jury have heard the evidence, if they think it a groundless accusation, they endorse upon the bill of indictment, ' not a true bill ' or ' not found ' : the bill is then thrown out, and the party accused discharged without further answer. But a fresh bill may afterwards be preferred to a subsequent Grand Jury.

If however, they are satisfied of the truth of the accusation, they then endorse ' a true bill ' : the indictment is then said to be found and the party stands indicted. A majority of the Grand Jury must agree, i. e., not less than twelve." (2)

Saunders says : " Upon the conclusion of the whole evidence, the Grand Jury decide upon whether or not they will find the bill. To justify their finding it, a *majority* of their body must give this course their sanction, and that *majority* must consist of twelve at least. If *they agree* to find it, the chairman indorses it with the words ' a true bill ' and signs his name If, however, ' *they agree*' to ignore it, the endorsement is in the same way, but with the words ' *No true bill.*" (3)

Chitty says : " After the Grand Jury have heard the evidence, they are to decide whether the bill shall be found or rejected. In the finding, twelve of the jurymen, at least, must concur, but, if the rest of the jury dissent, the finding will still be valid. The jury cannot find one part of the same charge to be true and another false, but they must either maintain or reject the whole." (4)

Harris says : " If the *majority* of them think that the evidence makes out a sufficient case, the words ' a true bill ' are indorsed on the back of the bill : if they are of the opposite opinion, the words ' not a true bill ' are so endorsed." (5)

Objections to Grand Jury.—It has recently been decided that objections to the constitution of a Grand Jury cannot be taken by way of challenge.

The question came up at Quebec in October 1892, in the case of R. v. Mercier and others, upon an indictment for conspiracy The defendants objected to the Grand Jury, as a whole, by a challenge to the array, and, to some individual members of the Grand Jury, by way of challenge to the polls. On behalf of the Crown, it was contended that there was in this country no such right of challenge; and Bossé, J., after fully reviewing and ably discussing the authorities on the subject, came to the following conclusions : 1. That, although both English and Canadian statutes contain provisions for challenging the petty jury, they contain none for challenging the Grand Jury ; 2. That we have in Canada no known precedent giving the right to challenge the Grand Jury or any of the Grand Jurors; 3 That. in England, it was admitted, in 1811, notwithstanding the opinions of Hawkins and Hale, (6) that, for two hundred years, objections to the Grand Jury were always taken by way of plea to the indictment, and not by way of challenge ; and, 4. That since 1811, the matter had not been controverted, and that, in 1848, in the case of R. v. Duffy, (7) the only case reported on the subject, since 1811, objections to the Grand Jury were taken by way of plea.

To shew the reason of the difference of procedure in objecting to the Grand Jury, and in objecting to the Petit Jury, Bossé, J , quoted, from the case of R, v. Sheridan, the following remarks of Solicitor-General Bushe :—

" It is a mistake of the nature of a challenge to suppose that it lies to a Grand Juror. A challenge is an objection by a man about to be tried, to the man who

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(1) Arch. Quar. Sess. 404.
(2) Wharton's Law Lex. verbo. *Grand Jury.*
(3) Saunder's Prac. 314.
(4) 1 Chitty, Cr. L. 322.
(5) Harris Cr. L. 427.
(6. See Hawk. P. C., c. 25, p. 16 ; Hale, P C., 126-255.
(7) R. v. Duffy, 4 Cox, 172.

is about to try him, but the Grand Jury are not to try any man; they are not brought into contact with any accused person. Their oath merely binds them to enquire into the offences brought before them and pronounce whether there be sufficient reason for putting those offences into a state for further investigation.

Until they be found, no man can tell who they are; when he, against whom they find a bill, sees their name in the caption of the indictment, if he discover a legal objection to any of them, he may, by plea, urge that objection as a reason for not answering to the indictment, but the notion of a previous challenge would not only be against principle, but induce absurdities and injustice in practice." (1)

The learned Judge also quoted the following remarks of Chief Justice Downes:

"The objection to such a challenge is founded upon good reason. The party who comes to urge it may or may not be present—may or may not be indicted; and if it were open to him to make an objection by challenge, because informations have been sworn against him, so must it, in all cases, be open to every person against whom informations have been sworn; and if so, besides the great inconvenience it must create in the administration of justice, many persons must be precluded from availing themselves of the objection afterwards; because the rule of pleading is, that to take advantage of a disqualification, it must be alleged, in the first instance, and if afterwards urged, it must be disallowed, because the party has lost his opportunity - and if he were absent, it was his own fault,—he might have been present.

Now, although we have no instance, from the oldest books in the law to those of our own time, where a *challenge* to a Grand Jury has been taken, there are abundant instances, in which the party has availed himself of objections to the Grand Jurors by plea: and these instances demonstrate the mode by which the party is to avail himself of such objections.

It would be monstrous to say that an illegal Grand Jury should find an indictment, and that the man accused should have no mode to avoid it. If it were a question unsettled, and the accused had no other mode of availing himself of the objection, save by challenge, there is no doubt that he must have the right. But if there be no instance to be found of a challenge, for hundreds of years, and there be abundant instances of pleas, it cannot be doubted that the latter is the only mode by which a party can avail himself of an objection." (2)

The judgment of Bossé, J., was concurred in by Blanchet, J., and the challenges were rejected. (3)

Article 656, *post*, now provides that any objection to the constitution of the Grand Jury may be taken by motion to quash the indictment.

Where a prosecutor was on the panel of Grand Jurors who found a true bill, the indictment was quashed, upon that ground: and it was held that it made no difference that he was not present when the bill was found. (4)

It is no ground for quashing an indictment that some of the Grand Jurors are related to the officer who arrested the prisoner; nor is a sheriff disqualified from summoning the jury, because he has directed the arrest. (5)

Where three persons were committed for trial on a charge of conspiracy and the Solicitor-General, afterwards, directed a bill to be preferred against a fourth person who was not committed, and all four were indicted together for the same conspiracy such a course was held to be unobjectionable. (6)

(1) R. v. Sheridan, 31 St. Tr. 552.
(2) R. v. Sheridan, 31 St. Tr. 572.
(3) R. v. Mercier *et al*, 1 Que. Off. Rep., (Q. B.), 541.
(4) R. v. Cunard, Ber. (N. B.) 326.
(5) R. v. Mailloux. 3 Pugsley, 493.
(6) Knowlden, v. R., 5 B. & S. 532; 33 L. J. (M. C), 219.

642. No trial upon any 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 of Grand Jury.—The foreman of the Grand Jury or any member of the Grand Jury who may, for the time being, act on behalf of the foreman in the examination of witnesses, may administer an oath to every person who appears before such Grand Jury to give evidence in support of any bill of indictment; and every such person may be sworn and examined upon oath by such Grand Jury touching the matters in question. R.S.C., c. 174, s. 174.

645. Names of witnesses to be endorsed on bill of indictment.—The name of every witness examined, or intended to be examined, shall be endorsed on the bill of indictment; and the foreman of the Grand Jury, or any member of the Grand Jury so acting for him, shall write his initials against the name of each witness sworn by him and examined touching such bill of indictment. R.S.C, c. 174, s. 175.

646. Names of witnesses to be submitted to Grand Jury.—The name of every witness intended to be examined on any bill of indictment shall be submitted to the Grand Jury by the officer prosecuting on behalf of the Crown, and no others shall be examined by or before such Grand Jury unless upon the written order of the presiding judge. R.S.C., c. 174, s. 176.

Although the Grand jury are not, usually, very strict as to documentary evidence, and will often admit copies instead of requiring the production of originals, and sometimes even receive parol proof of matters which, according to strict rules of evidence, should be in writing, they may, if they think fit, insist upon the same evidence, written and verbal, as may be necessary at the trial. It is, therefore, prudent in all cases, to be provided, at the time of the bill being preferred, with the same evidence with which you intend, afterwards to support the indictment, at the trial.

The deposition of a witness who is so ill as not to be able to travel, which, under Article 687, *post*, may be given in evidence before a petty Jury on the trial, may also be read in evidence before the Grand Jury. (1) But, before the deposition is read before the Grand Jury, the presiding judge should, by evidence *taken in the presence of the accused*, satisfy himself of the existence of the facts required, by Article 687, to make such deposition admissible in evidence. (2)

It is no objection that, at the trial, witnesses are called and examined, whose names are not endorsed on the indictment; and, in strictness, it is not necessary for the prosecutor to call every witness whose name is on the back of the indict-

(1) R v. Clements 2 Den. 251, 20. L. J. (M. C.) 193.
(2) R. v. Beaver, 10 Cox, 274, See, *also*, R. v. Bullard, 12 Cox. 353, *and* R. v. Gerrans, 13 Cox. 158.

ment, although it is usual to do so, in order that the defendant may have the benefit of cross examination. (1) And, if the prosecutor will not call them the judge in his discretion may. (2)

A witness who gives false evidence before a Grand Jury is indictable for perjury, and the other witnesses examined on the same bill are good witnesses to prove it. (3)

Although the Grand Jury have been formally discharged, yet, if they have not left the precincts of the Court, nor separated, they may be recalled and charged with other bills. (4)

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, (5) or to the like effect. Upon production of such certificate to any justice for the county or place in which the indictment was found, or in which the accused is or resides or is suspected to be or reside, such justice shall issue his warrant to apprehend him, and to cause him to be brought before such justice, or before any other justice for the same county or place, to be dealt with according to law. The warrant may be in the form HH in schedule one hereto, (6) or to the like effect.

2. If it is proved upon oath before such justice that any one apprehended and brought before him on such warrant is the person charged and named in such indictment, such justice shall, without further inquiry or examination, either commit him to prison by a warrant which may be in the form II in schedule one hereto, (7) or to the like effect, or admit him to bail as in other cases provided ; but

(1) R. v. Simmonds, 1 C. & P. 84; R. v. Beezley, 4 C. & P. 220; R. v. Vincent 9 C. & P. 91.
(2) R. v. Whitehead, 4 C. & P. 322, *n*: R. v. Holden, 8 C. & P. 610.
(3) R. v. Hughes, 1 C. & K. 519.
(4) R. v. Holloway, 9 C. & P. 43.
(5) See p. 211, *post*, for form GG.
(6) See p. 611, *post*, for form HH.
(7) For form II, see p. 612, *post*.

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, (1) or to the like effect. R.S.C., c. 174, ss. 33, 34 and 35.

Outlawry.—Formerly, when an indictment, was found by a Grand Jury against any person, and summary process proved ineffectual to the apprehension of the defendant, process of outlawry was issued;—outlawry being a punishment inflicted by the law upon an offender, for contumacy, in refusing to render himself amenable to justice. (2) It lay not only in cases of treason and felony, but it appears to have been considered sustainable on an indictment for any crime whatever. (3)

An outlawry in cases of treason or felony amounted to a *conviction* and *attainder* of the offence charged in the indictment as much as if the offender had been found guilty upon trial by a jury; (4) but, in cases of misdemeanor, it did not enure as a conviction for the offence found by the indictment, but merely as a conviction of the contempt for not answering. (5)

By Article 962 of the present Code, outlawry is abolished, so far as Canada is concerned; and although it is still an integral part of the criminal law in England, it seems that even there, proceedings in outlawry are so rare as to be almost extinct. (6)

The Royal Commissioners introduced into their Draft Code, a section to abolish outlawry in England: and, in their Report, they refer to the subject, in the following terms:—"If an indictment is found against a person who cannot be apprehended—if, for instance, he goes to a foreign country—the ultimate process against him is *outlawry*, which has all the effects of a conviction, including that of *forfeiture* abolished in all other cases. This process has become practically obsolete, and, in these times in which extradition treaties have been very generally adopted, it is less likely to be of use than formerly. We accordingly propose to abolish it."

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(1) For form JJ, see p. 612, *post*.
(2) 1 Chitty's Cr. L. 347; Bac. Abr., *outlawry*; Doct. & Stud. *dial.* 2, *cap.* 3.
(3) 2 Hale, 194; 2 Hawk, c. 27, s. 113.
(4) 4 Bl. Com. 319; 2 Hawk. c. 48, s. 22.
(5) R. v. Tippen, 2 Salk. 494.
(6) Short & Miller's Cr. Off. Prac. 384.

FORMS UNDER PART XLVIII.

FROM SCHEDULE ONE.

GG.—(*Section* 648.)

CERTIFICATE OF INDICTMENT BEING FOUND.

Canada,
Province of ,
County of .

I hereby certify that at a Court of (Oyer and Terminer, *or* General Gaol Delivery, *or* General Sessions of the Peace) holden in and for the county of , at , in the said (county), on , a bill of indictment was found by the Grand Jury against A. B., therein described as A. B., late of (*labourer*), for that he (*&c., stating shortly the offence*), and that the said A. B. has not appeared or pleaded to the said indictment.

Dated this day of , in the year

Z. X.
(*Title of officer.*)

HH—(*Section* 648.)

WARRANT TO APPREHEND A PERSON INDICTED.

Canada,
Province of ,
County of ,

To all or any of the constables and other peace officers in the said county of

Whereas it has been duly certified by J. D., clerk of the (*name the court*) *or* E. G., deputy clerk of the Crown *or* clerk of the peace, *or as the case may be*, in and for the county of , (that (*&c., stating the certificate*). These are therefore to command you in Her Majesty's name forthwith to apprehend the said A. B., and to bring him before (*me*) or some other justice or justices of the peace in and for the said county to be dealt with according to law.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid

J. S., [SEAL.]
J. P., (*Name of county.*)

II.—(*Section* 648.)

WARRANT OF COMMITMENT OF A PERSON INDICTED.

Canada,
Province of ,
County of .

To all or any of the constables and other peace officers in the said county of , and the keeper of the common gaol, at , in the said county of

Whereas by a warrant under the hand and seal of , (*a*) justice of the peace in and for the said county of , dated , after reciting that it had been certified by J. D., (*&c., as in the certificate*), the said justice of the peace commanded all or any of the constables or peace officers of the said county, in Her Majesty's name, forthwith to apprehend the said A. B., and to bring him before (*him*) the said justice of the peace or before some other justice or justices in and for the said county, to be dealt with according to law; and whereas the said A. B. has been apprehended under and by virtue of the said warrant, and being now brought before (*me*) it is hereupon duly proved to (*me*) upon oath that the said A. B. is the same person who is named and charged as aforesaid in the said indictment: These are therefore to command you, the said constables and peace officers, or any of you, in Her Majesty's name, forthwith to take and convey the said A. B. to the said common gaol at , in the said county of , and there to deliver him to the keeper thereof, together with this precept; and (*I*) hereby command you the said keeper to receive the said A. B., into your custody in the said gaol, and him there safely to keep until he shall thence be delivered by due course of law.

Given under (*my*) hand and seal, this day of in the year , at , in the county aforesaid.

J. S., [SEAL.]
J. P., (*Name of county.*)

JJ.—(*Section* 648.)

WARRANT TO DETAIN A PERSON INDICTED WHO IS ALREADY IN CUSTODY FOR ANOTHER OFFENCE.

Canada,
Province of ,
County of .

To the keeper of the common gaol at in the said county of

Whereas it has been duly certified by J. D., clerk of the (*name the court*) (*or* deputy clerk of the Crown *or* clerk of the peace of and for

the county of , *or as the case may be*) that (*&c., stating the certificate*); And whereas (*I am*) informed that the said A.B. is in your custody in the said common gaol at aforesaid, charged with some offence, or other matter; and it being now duly proved upon oath before (*me*) that the said A. B., so indicted as aforesaid, and the said A. B., in your custody, are one and the same person: These are therefore to command you, in Her Majesty's name, to detain the said A. B. in your custody in the common gaol aforesaid, until by a writ of *habeas corpus* he shall be removed therefrom, for the purpose of being tried upon the said indictment, or until he shall otherwise be removed or discharged out of your custody by due course of law.

Given under (*my*) hand and seal, this day of in the year , at ; in the county aforesaid.

J. S., [SEAL.]
J. P. (*Name of county.*)

PART XLIX.

REMOVAL OF PRISONERS—CHANGE OF VENUE.

649. Removal of prisoners.—The Governor in Council or the Lieutenant-Governor in Council of any province may, if, from the insecurity or unfitness of any gaol of any county or district for the safe custody of prisoners, or for any other cause, he deems it expedient so to do, order any person charged with an indictable offence confined in such gaol or for whose arrest a warrant has been issued, to be removed to any other place for safe keeping or to any gaol, which place or gaol shall be named in such order, there to be detained until discharged in due course of law, or removed for the purpose of trial to the gaol of the county or district in which the trial is to take place; and a copy of such order, certified by the clerk of the Queen's Privy Council for Canada, or the clerk of the Executive Council, or by any person acting as such clerk of the Privy Council or Executive Council shall be sufficient authority to the sheriffs and gaolers of the counties or districts respectively named in such order to deliver over and to receive the body of any person named in such order. R.S.C., c. 174, s. 97.

2. The Governor in Council or a Lieutenant-Governor in Council may, in any such order, direct the sheriff in whose custody the person to be removed then is, to convey the said person to the place or gaol in which he is to be confined, and in case of removal to another county or district shall direct the sheriff or gaoler of such county or district to receive the said person, and to detain him until he is discharged in due course of law, or is removed for the purpose of trial to any other county or district. R.S.C., c. 174, s. 98.

3. The Governor in Council or a Lieutenant-Governor in Council may make an order as hereinbefore provided in respect of any person under sentence of imprisonment or under sentence of death, —and, in the latter case, the sheriff to whose gaol the prisoner is removed shall obey any direction given by the said order or by any subsequent order in council, for the return of such prisoner to the custody of the sheriff by whom the sentence is to be executed. R.S.C., c. 174, s. 100.

650. Indictment after removal.—If after such removal a true bill for any indictable offence is returned by any Grand Jury of the county or district from which any such person is removed, against any such person, the court into which such true bill is returned, may make an order for the removal of such person, from the gaol in which he is then confined, to the goal 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.

The principle ground upon which a change of venue has hitherto been granted and upon which the Court or Judge, in the exercise of the discretionary power conferred by this Article, will no doubt in future order the place of trial to be changed, is that there is a fair and reasonable probability of partiality and prejudice in the district, county, or place within which the indictment would otherwise be tried. (1) For instance, the place of trial was changed in a case in which the Court of Magistrates was interested in the result of the trial. (2) And, where a magistrate, in the commission for the county, was indicted at the Quarter Sessions, and circulated among the other magistrates a printed account of the charges, an order was made changing the place of trial, (3) as, also, where the prosecutor or his attorney was the sheriff or under-sheriff. (4)

In some cases writs of *certiorari* (5) have been granted by the English courts to remove the indictment and so changed the place of trial in prosecutions for conspiracy, even where one only of several defendants made the application without the consent of the others. (6) But the removal, in each of these cases, appears to have been allowed on the application of a defendant, who was a responsible person, he entering into a recognizance to pay costs in case of the conviction of himself or of any of other defendants, in accordance with the Rules of the English Crown Office.

As a rule applications on the part of the defendant to change the place of trial upon an indictment for perjury, forgery, murder or other heinous offence, have been refused, where the delay tended to defeat the prosecution. (7)

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(1) R. v. Lewis, 1 Str. 704; R v. Fowle. 2 Ld. Raym. 1452; R. v. Waddington, 1 East, 167; R. v. Penpraze, 4 B. & Ad. 573; 1 Nev. & M 312; R. v. Hunt, 3 B. & Ald. 444; R. v. Palmer, 5 E. & B. 1024.

(2) R. v. Jones, Har. & W. 293.

(3) R. v. Grover, 8 Dowl. 325.

(4) R. v. Webb, 2 Str. 1068; R. v. Knatchbull, 1 Salk. 150.

(5) A writ of *certiorari* is the usual means, in England of removing an indictment, although, under the Judicature Act, it may in some cases be done by means of an order.

(6) R v. Wilks, 5 E. & B. 690; 25 L. J. (Q. B.) 47; R. v. Rowlands, 2 Den. 364; 21 L. J. (M. C.) 81; R. v. Foulkes, 1 L. M. & P. 720; 20 L J. (M. C.) 196; R. v. Probert, Dears. 30; R. v. Jewell, 7 E. & B. 140; 26 L. J. (Q. B.) 177.

(7) 2 Hawk. c. 27, s. 28; R. v. Pusey, 2 Str. 717; R. v. Mead, 3 D. & R. 301; R. v. Thomas, 4 M. & Sel. 442.

PART L.

ARRAIGNMENT.

652. Bringing prisoner up for arraignment. — If any person against whom any indictment is found is at the time confined for some other cause in the prison belonging to the jurisdiction of the Court by which he is to be tried, the Court may by order in writing, without a writ of *habeas corpus*, direct the warden or gaoler of the prison or sheriff or other person having the custody of the prisoner to bring up the body of such person as often as may be required for the purposes of the trial, and such warden, gaoler, sheriff or other person shall obey such order. R.S.C., c. 174, s. 101.

653. Right of accused to inspect depositions and hear indictment. —Every accused person shall be entitled at the time of his trial to inspect, without fee or reward, all depositions, or copies thereof, taken against him and returned into the Court before which such trial is had, and to have the indictment on which he is to be tried read over to him if he so requires. R.S.C., c. 174, s. 180.

654. Copy of indictment.—Every person indicted for any offence shall, before being arraigned on the indictment, be entitled to a copy thereof on paying the clerk five cents per folio of one hundred words for the same, if the Court is of opinion that the same can be made without delay to the trial, but not otherwise. R.S.C., c. 174, s. 181.

655. Copy of depositions.—Every person indicted shall be entitled to a copy of the depositions returned into Court on payment of five cents per folio of one hundred words for the same, provided, if the same are not demanded before the opening of the assizes, term, sittings or sessions, the Court is of opinion that the same can be made without delay to the trial but not otherwise; but the Court may, if it sees fit, postpone the trial on account of such copy of the depositions not having been previously had by the person charged. R.S.C., c. 174, s. 182.

656. Pleas in abatement abolished.—No plea in abatement shall be allowed after the commencement of this Act. Any objection to the constitution of the Grand Jury may be taken by motion to the Court, and the indictment shall be quashed if the court is of opinion both that such objection is well founded and that the accused has suffered or may suffer prejudice thereby, but not otherwise.

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 ; *second*, reading the indictment to him ; and *third*, asking him whether he is guilty or not of the offence charged.

The practice of requiring the prisoner, at the time of his arraignement to hold up his right hand is a ceremony which was never essentially necessary, and is not now generally used, except when two or more prisoners are arraigned

together, upon the same indictment, for the purpose of ascertaining which of them is A. B., C. D., and so forth; and the ancient form of asking the prisoner how he will be tried is obsolete. (1)

At his arraignment, the prisoner is to be brought to the bar, without shackles or other restraint, unless there be special circumstances shewing danger of escape (2) In Layer's case, (3) a distinction was taken between the time of arraignment and the time of trial, and the prisoner in that case was compelled during his arraignment, to stand at the bar, in irons; but the ruling in that case does not seem to be in accord with the general authority of the expositors of the common law. The *Mirror* says, "It is an abuse that a prisoner is laden with irons or put to pain before attainted of felony." (4)

The usal form of question put to the defendant, after the reading of the indictment, is as follows:—"*How say you?* Are you *guilty or not guilty?*"

657. **Plea.—Refusal to plead.**—When the accused is called upon to plead he may plead either guilty or not guilty, or such special plea as is hereinbefore provided for.

2. If the accused wilfully refuses to plead, or will not answer directly, the Court may order the proper officer to enter a plea of not guilty. R.S.C., c. 174, s. 145.

Where it is a matter of doubt whether or not a prisoner is *wilful* in his refusal to plead or omission to answer directly, the Court may direct a Jury to be forthwith empanelled and sworn to try the question. The form of the oath to the jury in such a case is as follows:—You shall well and truly try whether A. B., the prisoner at the bar who stands charged with an indictable offence refuses to plead (*or* "omits to give a direct answer") *wilfully*, or by the visitation of God, and a true verdict give according to the evidence: So help you God.

If a person be found to be mute *ex visitatione Dei*, the Court, in its discretion, will use such means as may be sufficient to enable the prisoner to understand the charge, and make his answer; and if this be found impracticable a plea of *not guilty* should be entered, and the trial proceed. (5)

Where a prisoner appeared to be deaf, dumb, and also of non-sane mind, Alderson, B., put three distinct issues to the Jury, directing the jury to be sworn severally as to each—1, Whether the prisoner was mute of malice, or by the visitation of God; 2, whether he was able to plead; 3, whether he was sane or not. And on the last issue they were directed to enquire whether the prisoner was of sufficient intellect to comprehend the course of the proceedings on the trial, so as to make a proper defence, to challenge a juror whom he might wish to object to, and to understand the details of the evidence. (6)

On the trial of a deaf mute for felony, he was found guilty, but the Jury also found that he was incapable of understanding and did not understand the proceedings at the trial; upon which finding it was held that the prisoner could not be convicted, but must be detained as a non-sane person during the Queen's pleasure. (7)

In another case, where the prisoner was indicted at the Central Criminal

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(1) 2 Hawk. c. 28, s. 2.
(2) 2 Hawk. c 28, s. 1.
(3) R. v. Layer, 16 How. St. Tr. 94.
(4) The *Mirror*, c. 5 s 1. See, also *Britton*, (by Nichols), vol. 1, p. 44; 3 Inst. 34: and Staundf. P C. 78.
(5) 1 Chit. Cr L. 417.
(6) R. v. Pritchard, 7 C & P. 303.
(7) R. v. Berry, 1 Q B. D. 447; 45 L J. (M. C.) 123.

Court, 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 enquire whether the prisoner was in a fit state of mind to plead to the indictment, and, it appearing, from the evidence, that the prisoner seemed to understand the nature of the crime for which he was indicted, but that he seemed unable to understand the distinction between a plea of "guilty" and of "not guilty." the Jury, at the suggestion of the learned judge, returned a verdict that the prisoner was of unsound mind and incompetent to plead. (1)

From the earliest times it has been the law that, when a prisoner, though he may have been perfectly sane when he committed the offence for which he was indicted, was found to be insane at the time of arraignment, he shall not be arraigned for it; for he is not in full possession of his senses, so as to be capable of pleading to the indictment with due caution, or doing what is necessary for his defence. (2)

Article 737, *post*, makes provision for the trial of any person who appears, at any time after the finding of an indictment against him, to be incapable, on account of insanity, of conducting his defence.

If the defendant pleads "not guilty," his plea is recorded by the officer of the Court,—either by writing "*po. se.*," an abbreviation of the words, *ponil se super patriam*, or, as at the Central Criminal Court, by the word, "*puls*," and by an entry in the minute book of the Court. (3)

658. Special provisions in cases of treason.—When any one is indicted for treason, or for being accessory after the fact to treason, the following documents shall be delivered to him after the indictment has been found, and at least ten days before his arraignment; that is to say:

(*a.*) a copy of the indictment;

(*b.*) a list of the witnesses to be produced on the trial to prove the indictment; and

(*c.*) a copy of the panel of the jurors who are to try him returned by the sheriff.

2. The list of the witnesses and the copy of the panel of the jurors must mention the names, occupations, and places of abode of the said witnesses and jurors.

3. The documents aforesaid must all be given to the accused at the same time and in the presence of two witnesses.

4. This section shall not apply to cases of treason by killing Her Majesty, or to cases where the overt act alleged is any attempt to injure her person in any manner whatever, or to the offence of being accessory after the fact to any such treason.

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(1) R. v. Wheeler, Arch. Cr. Pl. & Ev. 21 Ed. 161.
(2) 4 Bl. Com. 24.
(3) See R. v Newman, 2 Den. 392; 21 L. J. (M. C.) 75, 76.

PART LI.

TRIAL.

With regard to the Part of the English Draft Code, which deals with trial, the English Commissioners make, in their Report, the following remarks :

"It does not go into minute detail through every part of it ; but notices those parts only on which the law appears to require statement or alteration.

Sections 518, 519 and 520 (1) state the law as to going through the panel, introducing into England some of the provisions of 39 & 40 Vict. c. 78 (as to Ireland), and providing that the number of jurors to be peremptorily challenged shall henceforth be thirty-five in cases of treason, twenty in cases where the accused might upon conviction be sentenced to penal servitude for life, and six in all other cases. Some alteration is made necessary by the abolition of the distinction between felony and misdemeanour ; and what we suggest is something between the present English and the present Irish system. In England there are twenty peremptory challenges in all felonies, and none in any misdemeanor. In Ireland there are twenty in felony, and six in misdemeanor. Section 531 (2) abolishes juries of matrons, where pregnacy is pleaded, and substitutes a medical examination ; section 525 enables the court to adjourn or postpone the trial in order to obtain the attendance of any witness whose testimony appears material. This alteration is one of considerable importance.

Section 526 (3) permits admissions to be made in a criminal trial. At present if the accused is proved before his trial to have made an admission, it is evidence against him ; but though he offers to make the same admission in court, it is thought that in cases of felony the judge is obliged to refuse to let him do so.

Section 532 (4) gives the court a discretion as to allowing the jury to separate on an adjournment, except in capital cases. At present the practice is that they may separate in cases of misdemeanor, but not in cases of felony. Section 535 allows the court to direct that the jury should have a view, (5) which is already permitted by statute in Ireland (39 & 40 Vict. c. 78, s. 111). Section 536 enables the Court to take a verdict on Sunday. (6) This provision was suggested by the case of Winsor v. R., (7) in which it was stated, as

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(1) Articles 666 and 667 *post* are identical with secs. 518 and 519 of the English Draft Code ; but Article 668 differs from sec. 520 of the English Draft as to the number of challenges.
(2) See Article 731, *post*.
(3) See Article 690, *post*.
(4) See Article 673 *post*.
(5) See Article 722, *post*.
(6) See Article 729, *post*,
(7) L. R. 1 Q. B. 317, 322 ; 35 L. J. (M. C.) 121.

one reason for discharging the jury late on a Saturday night, that. if they agreed to their verdict on Sunday, the verdict could not be taken till the Monday.

Section 537 preserves the power of staying proceedings, always hithereto possessed by the Attorney General, and at present exercised by entering a *nolle prosequi* on the record. (1)

We have passed over section 523, which enables the accused to offer himself as a witness. The bill contained a clause (section 368) enabling the accused to make an unsworn statement on his own behalf, and subjecting him to cross-examination of a restricted character. For this we have substituted section 523, which renders the accused and the husband or wife of the accused competent witnesses for the defence. (2) As regards the policy of a change in the law so important, we are divided in opinion. The considerations in favour of and against the change have been frequently discussed and are well known. On the whole, we are of opinion that, if the accused is to be admitted to give evidence on his own behalf, he should do so on the same conditions as other witnesses, subject to some special protection in regard to cross-examination."

659. Right to full defence.—Every person tried for any indictable offence shall be admitted, after the close of the case for the prosecution, to make full answer and defence thereto by counsel learned in the law. R.S.C., c. 174, s. 178.

660. Presence of accused at trial.—Every accused person shall be entitled to be present in Court during the whole of his trial unless he misconducts himself by so interrupting the proceedings as to render their continuance in his presence impracticable.

2. The Court may permit the accused to be out of Court during the whole or any part of any trial on such terms as it thinks proper.

661. Right of prosecutor to sum up.—If an accused person, or any one of several accused persons being tried together, is defended by counsel, such counsel shall, at the end of the case for the prosecution, declare whether he intends to adduce evidence or not on behalf of the accused person for whom he appears; and if 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

(1) See Article 732, *post*.
(2) This provision is contained in sec. 4 of the Canada Evidence Act 1893, *post*.

of reply shall be always allowed to the Attorney-General or Solicitor-General, or to any counsel acting on behalf of either of them. R.S.C., c. 174, s. 179.

In opening the case to the Jury the counsel for the prosecution should state *all* that it is proposed to prove, as well declarations of the prisoners as 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; (1) unless the declarations of the prisoner amount to a *confession*, when it would be improper for counsel to open them to the Jury. (2) The reason of this rule is, that the circumstances under which the confession was made may render it inadmissible in evidence. The *general effect* only of any confession said to have been made by a prisoner may be mentioned in the opening address of the prosecuting counsel. When any additional evidence not mentioned in the opening speech of counsel is discovered in the course of a trial, counsel is not allowed to state it in a second address to the Jury. (3)

In opening a case for murder, it has been held that the counsel for the prosecution may put hypothetically the case of an attack upon the character of any particular witness for the Crown, and say that should any such attack be made he shall be prepared to meet it: (4) and that he may read to the Jury the observations of a Judge in a former case, as to the nature and effect of circumstantial evidence, provided he adopts them as his own opinions, and makes them part of his address to the Jury. (5)

In a case at the Central Criminal Court in 1848, the Attorney-General having, in his opening address to the Jury, made reference to disturbances in Ireland, Erle, J., held, on objection made, that such reference was not irregular, it being laid down in books of evidence that allusion might be made in Courts of Justice to notorious matters even of contemporaneous history. (6)

The counsel for the prosecution states his case before he calls the witnesses, and when the evidence has been given, he either announces that he has nothing to say, or, he says, "I have already told you what would be the substance of the evidence, and you see the statement which I made is correct;" or, in exceptional cases, "Something is proved different to what I expected," and adds any suitable explanation that may be required. (7)

Defence.—Where a prisoner is undefended, that is, unrepresented by counsel, he cross examines the witnesses for the prosecution, if he thinks fit, or the judge does so on his behalf.

It may be mentioned also that, where the defendant himself wishes to address the jury, and to examine and cross-examine witnesses, he will be allowed to do so, and he may at the same time have counsel to argue any points of law that may arise in the course of the trial, and to suggest questions to him for the cross-examination of the witnesses. (8) But he cannot have counsel to examine and cross-examine the witnesses, and reserve to himself the right of addressing the jury. (9)

Where two prisoners are jointly indicted and are defended by different

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(1) Per Parke, B., R. v. Hartel, 7 C. & P. 773; R. v. Davis. 7 C. & P. 785.
(2) Per Bosanquet, J., and Patteson, J., 4 C. & P. 548. Per Parke, B., 7 C. & P. 786.
(3) R. v. Courvoisier, 9 C. & P. 362.
(4) Per Tindal, C. J., and Parke, B., 9 C. & P. 362.
(5) *Id.*
(6) R. v. Dowling, Arch. Cr. Pl. & Ev. 21 Ed. 179.
(7) R. v. Holchester, 10 Cox, 226, per Blackburn J.; R. v. Berens, 4 F. & F. 842, S. C.: See, also R. v Webb, 4 F. & F. 862.
(8) R. v. Parkins, R. & M. 166.
(9) R. v. White, 3 Camp. 98.

counsel, each counsel, in the order of seniority at the bar, cross-examines and addresses the jury for his client ; but where the judge thinks it desirable he will permit the counsel to cross-examine and address the jury not in the order of seniority, but in that in which the names of the defendants stand on the indictment. (1)

A prisoner defended by counsel would not, formerly, unless under some very special circumstances, be allowed to make his statement to the jury before his counsel addressed them (2) Where, however, the prisoners, who were indicted for robbery, with violence, were defended by counsel, but called no witnesses, Hawkins, J , after consultation with Lush, J., allowed the prisoners to give their own account of the matter to the jury, *after* their counsel had addressed the jury. (3) And where the prisoner who was indicted for murder, was defended by counsel, but called no witnesses Bowen, J., allowed the prisoner to read a statement of his account of the matter to the jury, *before* counsel addressed them. (4)

Under similar circumstances, Stephen, J., allowed the prisoner to make a statement to the jury, *before* his counsel addressed them, at the same time warning the prisoner that his making such statement would give the counsel for the prosecution a right to reply. (5)

Lord Coleridge, C. J., stated that by one of the resolutions of the majority of the judges in which he did not agree, but by which he was bound, it was undoubtedly competent for a prisoner defended by counsel to make a statement of facts to the jury, and the proper time for his doing so was *after* his counsel had addressed the jury. His Lordship, however, held that that resolution did not extend to cases where it was proposed to call witnesses for the prisoner. (6)

Whether the prisoner's Counsel may state to the jury alleged facts which he has learned from the prisoner, but which he is not in a position to prove, was much doubted, and was ultimately settled in the negative. The late Mr. Justice Coleridge refused to allow Counsel to do so ; (7) and Lord Coleridge expressed his disapproval of the practice. (8) On the other hand, Mr Justice Crowder said that what a prisoner stated before the Magistrate he might repeat through his counsel at the trial ; (9) and upon the trial of an indictment for murder where no witnesses were called for the defence, the prisoner's counsel having expressed his regret that he could not give the prisoner's account, Cockburn, C. J., said he might do so, as the prisoner's counsel was in place of the prisoner, and entitled to say anything which the prisoner might say, for which he would be entitled to consideration and credence if consistent with the rest of the evidence. (10)

Mr Justice Hawkins also expressed a decided opinion that the prisoner's counsel might give the prisoner's version of the transaction in respect of which he stood charged although he called no evidence. (11)

In this unsettled state of practice it was, at a meeting of all the judges liable to try prisoners, held 26 Nov. 1881, resolved ; " That, in the opinion of the judges

(1) Per Rolfe, B., 2 M. & Rob. 617. See, also, R. v. Barber, 1 C. & K. 434.
(2) R v. Rider, 8 C. & P. 539 ; R. v. Malins, 8 C. & P. 242 ; R. v. Mansano, 2 F. & F. 64 ; R. v. Stephens, 11 Cox, 669.
(3) R. v. Hall & Smith, Yorkshire Winter Assizes, at Leeds, 3rd Feb. 1880.
(4) R. v. Blades, Yorkshire Summer Assizes, 2nd Aug. 1880.
(5) R. v. Doherty, 16 Cox, 306.
(6) R. v. Millhouse, 15 Cox, 622. See, also, R. v. Shimmin, 15 Cox, 122.
(7) *In* R. v. Butcher, 2 Moo. & Rob. 228.
(8) *In* R. v. Lefroy, Maidstone Winter Assizes, 1881, Arch. Cr. Pl. & Ev. 21 Ed. 181.
(9) R. v. Haines, 1 F. & F. 86.
(10) R. v. Weston, 14 Cox, 346.
(11) R. v. Hall & Smith, *supra.*

it is contrary to the administration and practice of the criminal law as hitherto allowed, that counsel for prisoners should state to the jury, matters which they have been told in their instructions, on the authority of the prisoner, as being alleged existing facts, but which they do not propose to prove in evidence." The question of the propriety of laying down a rule as to the practice of allowing prisoners to address the jury before the summing up of the judge, when their counsel have addressed the jury, was then discussed and adjourned for further consideration. (1)

In a case subsequent to the above mentioned resolution of the judges, Cave, J., refused to allow the prisoner's counsel to give the prisoner's version of the facts of the case, which he was unprepared to support by evidence, but allowed the prisoner himself to give his own version of the facts of the case, after his counsel had addressed the Jury, subject, however, to a right of reply, on the part of the prosecution, on the new matter thus laid before the jury. His Lordship said that this was the rule of practice intended to be followed, in future. (2)

A prisoner is, now, under section 4 of the Canada Evidence Act, 1893, a competent witness.

Reply.—If the defendant calls no witnesses his counsel has the right, under clause 2 of the above Article, 661, of addressing the jury *last* But if the defendant calls witnesses the right to address the jury *last* belongs to the counsel for the prosecution. Even if the evidence for the defendant be only to his character, it gives, in strictness, a right of reply ; although it appears, that in such a case the right is seldom exercised. (3)

If two prisoners are indicted jointly for the same offence, and one calls witnesses it seems that the counsel for the prosecution is entitled to a general reply; but if the offences are separate, and they might have been separately indicted, he can reply only on the case of the party who called witnesses. (4)

Where four prisoners were indicted for aggravated assault, and only three of them were defended by counsel, and the prisoner who was undefended called witnesses to prove an alibi, but no witnesses were called on behalf of the other three prisoners, it was held that counsel for the prosecution had no general right of reply, but that it was the proper course for him to sum up his evidence generally and reply upon the evidence called by the undefended prisoner, before the counsel for the other three prisoners addressed the jury. (5)

Where several prisoners were jointly indicted, and defended by several counsel, and witnesses were called for some of the prisoners but not for the others, it was held that the counsel for the prosecution should first reply to the counsel of those prisoners who called witnesses, but that the counsel for the prisoners who called no witnesses had the right to address the jury last. (6)

If, on an indictment against several defendants one of them calls evidence which is applicable to the cases of all, it seems that the prosecution has a general right of reply, although the other defendants call no witnesses; but where such evidence is applicable only to the case of the defendant who calls it and does not apply to the cases of the other defendants, the right of the prosecution to reply is restricted to the case of the defendant calling the evidence.

Rebuttal.—Whenever the defendant, by way of defence, calls evidence proving new matter, which the Crown could not foresee. the counsel for the prosecution is entitled to call witnesses, in reply, to contradict it. (7)

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(1) 47 J. P. 777. (8th Dec. 1883).
(2) R. v. Shimmin, *supra*.
(3) R. v. Dowse, 4 F. & F. 492.
(4) R. v. Hayes, 2 M. & R. 155 ; R. v. Jordan, 9 C. & P. 118.
(5) R. v. Kain, 15 Cox, 388.
(6) R. v. Burns, 16 Cox, 195.
(7) See R. v. Frost, 9 C. & P. 159.

Judge's charge or summing up. — After the evidence is in, and the speeches of counsel for and against the prisoner are delivered, the Judge addresses to the Jury his charge or summing up. The chief object of it is to explain to the Jury the law of the case, to point out the essentials to be proved on the one side and the other, and to bring to view the relations of the evidence adduced to the issues involved.

On this subject Sir James F. Stephen says:—"I think that a judge who merely states to the Jury certain propositions of law, and then reads over his notes, does not discharge his duty. I also think that a Judge who forms a decided opinion before he has heard the whole case, or who allows himself to be in any degree actuated by an advocate's feelings, in regulating the proceedings, altogether fails to discharge his duty; but I further think that he ought not to conceal his opinion from the Jury, nor do I see how it is possible for him to do so, if he arranges the evidence in the order in which it strikes his mind. The mere effort to see what is essential to a story, in what order the important events happened, and in what relation they stand to each other, must of necessity point to some conclusion. The act of stating for the Jury the questions which they have to answer and of stating the evidence bearing on those questions and shewing in what respects it is important, generally goes a considerable way towards suggesting an answer to them; and, if a Judge does not do as much at least as this, he does almost nothing.

The judge's position is thus one of great delicacy and it is not, I think, too much to say that to discharge the duties which it involves as well as they are capable of being discharged, demands the strenuous use of uncommon faculties, both intellectual and moral. It is not easy to form and suggest to others an opinion founded upon the whole of the evidence, without on the one hand shrinking from it, or, on the other, closing the mind to considerations which make against it. It is not easy to treat fairly arguments urged in an unwelcome or unskilful manner. It is not easy for a man to do his best, and yet to avoid the temptation to choose that view of a subject which enables him to shew off his special gifts. In short, it is not easy to be true and just. That the problem is capable of an eminently satisfactory solution there can, I think, be no doubt. Speaking only of those who are long since dead, it may be truly said that, to hear, in their happiest moments, the summing up of such judges as Lord Campbell, Lord Chief Justice Erle, or Baron Parke, was like listening not only (to use Hobbes's famous expression), to '*law living and armed*,' but to the voice of Justice itself." (1)

662. Qualifications of Jurors.—Every person qualified and summoned as a Grand or Petit Juror, according to the laws in force for the time being in any province of Canada, shall be duly qualified to serve as such Juror in criminal cases in that province. R.S.C., c. 174, s. 160.

663. Jury de medietate linguæ abolished.—No alien shall be entitled to be tried by a jury *de medietate linguæ*, but shall be tried as if he was a natural born subject. R.S.C., c. 174, s. 161.

This Article, which is a re-enactment of Sec. 161, R.S.C., c. 174, is to the same effect as sec. 5 of the Imperial statute 33 & 34 Vict. c. 14 (The Naturalisation Act 1870); before the passing of which an alien was entitled to be tried by a jury *de medietate linguæ*, when indicted for any felony or misdemeanor, but not when indicted for high treason.

See clause 4 (*d*) of Article 668, *post*.

664. Mixed Juries in Province of Quebec.—In those districts in the province of Quebec in which the sheriff is required by law to

(1) Steph. Gen. View. Cr. L. 2nd Ed. 170.

return a panel of Petit Jurors composed one half of persons speaking the English language, and one half of persons speaking the French language, he shall in his return specify separately those Jurors whom he returns as speaking the English language, and those whom he returns as speaking the French language respectively; and the names of the Jurors so summoned shall be called alternately from such lists. R.S.C., c. 174, s. 166.

Article 2652, R, S. Que., provides that, "In the districts of Quebec and Montreal there shall be twenty-four grand jurors and sixty petit jurors summoned to serve before any court holding criminal jurisdiction, one half of whom shall be composed of persons speaking the French language and the other half of persons speaking the English language;" and that this provision "may be extended to any other district, by an order of the Lieutenant-Governor in Council, upon the presentment of the Grand Jury of such district, approved by the presiding judge, declaring the expediency of such extension."

By Article 2653, R. S. Que., it is provided that, "In districts other than those of Quebec and Montreal and in those to which the provisions of the preceding article are made to apply, when application for a jury *de medietate linguæ* is made to the judge of the district in which the court is to sit, the court may, if it deem it expedient, authorize the sheriff of the district to summon a petit jury composed one half of persons speaking the French language and one half of persons speaking the English language."

665. Mixed juries in Manitoba.—Whenever any person who is arraigned before the Court of Queen's Bench for Manitoba demands a jury composed, for the one half at least, of persons skilled in the language of the defence, if such language is either English or French, he shall be tried by a jury composed for the one half at least of the persons whose names stand first in succession upon the general panel and who, on appearing and not being lawfully challenged, are found, in the judgment of the court, to be skilled in the language of the defence.

2. Whenever, from the number of challenges or any other cause, there is in any such case a deficiency of persons skilled in the language of the defence the court shall fix another day for the trial of such case, and the sheriff shall supply the deficiency by summoning, for the day so fixed, such additional number of jurors skilled in the language of the defence as the court orders, and as are found inscribed next in succession on the list of petit jurors. R.S.C., c. 174, s. 167.

666. Challenging the array.—Either the accused or the prosecutor may challenge the array on the ground of partiality, fraud, or wilful misconduct on the part of the sheriff or his deputies by whom the panel was returned, but on no other ground. The objection shall be made in writing, and shall state that the person returning the panel was partial, or was fraudulent, or wilfully misconducted himself, as the case may be. Such objection may be in 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.

For Form of Challenge to the Array, (Form KK,) see p. 662, *post*.

The challenge ought to specify the grounds of objection. A challenge merely stating that the sheriff had not chosen the panel, indifferently and impartially, as he ought to have done, has been held too general. (1)

A challenge to the array attacks the whole panel of jurors, with a view to its being quashed and a new panel returned; and, under this Article, it may be based upon two kinds of grounds, namely,—1. PARTIALITY on the part of the Sheriff, or his Deputies, by whom the panel has been returned; and, 2. FRAUD or WILFUL MISCONDUCT on their part.

A challenge to the array may also be, either, a *principal* challenge, or, a challenge *for favor*.

A *principal* challenge to the array is where the *partiality* is manifest,—when there is some fact, whose existence is *inconsistent* with the impartiality of the sheriff or other officer returning the panel, that is, some fact whose existence makes it certain that he cannot be impartial; (2) as where the sheriff is the actual prosecutor, or the party aggrieved, in connection with the charge against the prisoner; (3) or, where, at the time of returning the panel, he was of actual affinity to the prosecutor or party aggrieved, (4) or if he have returned some jurors at the prosecutor's request, or if the sheriff or the bailiff who made the return be in litigation with the prisoner, or with the prisoner's husband; (5) or if the sheriff be a subscriber to a society who are the prosecutors in the case against the prisoner. (6).

In the case of a challenge to the array *for favor*, the groundof partiality is not so apparent and direct as in the case of a *principal* challenge, but consists of some fact whose existence is *likely* to interfere with the impartiality of the sheriff or other officer returning the Jury panel, or renders it improbable that he should be impartial and unbiassed; (7) as, where the sheriff and the prosecutor are united in the same office, or where the prosecutor is a tenant of the sheriff, or where a relationship exists between the children of the prosecutor and the sheriff, as in the case of a son of the sheriff having married the daughter of the prosecutor. (8)

If the Court holds that the fact alleged as a ground for a *principal* challenge is a good ground, and if the fact so alleged is denied, or if the Court holds that the fact alleged as a ground for a challenge *for favor* is a good ground of challenge for favor, and either the fact so alleged or the partiality sought to be inferred from it, or both, are denied, the question is decided by triers as provided by clause 2 of the above Article 666.

In the case of a *principal* challenge to the array, the only question for the triers to try is whether the fact alleged as the ground of challenge is true or not; but in the case of a challenge to the array *for favor*, there are two questions to be submitted to them, 1. Is the alleged fact true? And, 2, Has the

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(1) R. v. Hughes, 1 C. & K. 235.
(2) Steph. Dig. Cr. Proc. 184.
(3) R. v. Sheppard, 1 Leach, 101; R. v. Edmonds, 4 B. & Ald. 471; Arch. Cr. Pl. & Ev. 21 Ed. 173.
(4) See R. v. Rouleau, cit. at p. 630, *post*.
(5) Co. Litt. 156*a*; R. v. Rose Milne, 4 P. & B. (N. B.) 394.
(6) R. v. Dolby, 1 C. & K. 238.
(7) Steph. Dig. Cr. Proc. 184.
(8) Co. Litt. 156*a*; 3 Dyer, 367*a*; Arch. Cr. Pl. & Ev. 21 Ed. 174.

existence of that fact rendered the sheriff partial? For instance, suppose the fact alleged be that the prosecutor is a tenant of the sheriff, the triers must find, *first*, whether as a matter of fact, the prosecutor is a tenant of the sheriff, and *second*, whether, on account of the prosecutor being his tenant, the sheriff is partial.

The triers may be two of the Jurors returned. But the Court in its discretion may appoint any other two indifferent persons. (1)

If the triers decide in favor of the challenge, and the array is quashed, the *venire* for the empanelling of a new Jury is awarded to the Coroner, who, in this as in some other instances, acts as substitute for the sheriff, where exception is taken to the latter; and if the Coroner be interested or be otherwise incapable of acting, or be, for some good cause, objected to, the Jury will be arrayed by two persons named by the Court, and sworn to the discharge of their duty. (2) These persons have been called *elisors* or *electors*: and no challenge has been allowed to their array. (3)

Where cause exists for a challenge to the array the party liable to the objection may and ought, himself, to suggest it to the Court, in order to prevent the delay which the challenge would occasion, so that the *venire* may be at once awarded to the Coroner, or to elisors, as the case may be. (4)

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

(1) 2 Hale, 275; 4 Bl. Com. 353.
(2) See 1 Inst. 158; R. v. Dolby, 2 B. & C. 104.
(3) 3 Bl. Com. 355.
(4) Arch. Cr. Pl. & Ev. 21 Ed. 174.

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.

It will be seen by the extract,—set out at p. 619, *ante*,—from the Report of the English Commissioners, that some of the provisions of the Imperial Act 39 and 40 Vict., c. 78 (as to Ireland), have been introduced into the foregoing articles 666 and 667.

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 Queen and the accused; or

(*c.*) that any Juror has been convicted of any offence for which he was sentenced to death or to any term of imprisonment with hard labour or exceeding twelve months; or

(*d.*) that any Juror is an alien.

5. No other ground of challenge than those above mentioned shall be allowed.

6. If any such challenge is made the Court may in its discretion require the party challenging to put his challenge in writing. The challenge may be in the form LL in schedule one hereto, or to the like effect. The other party may deny that the ground of challenge is true.

7. If the ground of challenge is that the Jurors' names do not appear in the panel, the issue shall be tried by the Court on the *voir dire* by the inspection of the panel, and such other evidence as the Court thinks fit to receive.

8. If the ground of challenge be other than as last aforesaid the two Jurors last sworn, or if no Jurors have then been sworn then two persons present whom the court may appoint for that purpose shall be sworn to try whether the Juror objected to stands indifferent between the Queen and the accused, or has been convicted, or is an alien, as aforesaid, as the case may be. If the court or the triers find against the challenge the Juror shall be sworn. If they find for the challenge he shall not be sworn. If after what the court considers a reasonable time the triers are unable to agree the court may discharge them from giving a verdict, and may direct other persons to be sworn in their place.

9. The Crown shall have power to challenge four Jurors peremptorily, and may direct any number of Jurors not peremptorily challenged by the accused to stand by until all the Jurors have been called who are available for the purpose of trying that indictment.

10. The accused may be called upon to declare whether he challenges any Jurors peremptorily or otherwise, before the prosecutor is called upon to declare whether he requires such Juror to stand by, or challenges him either for cause or peremptorily. R.S.C., c. 174, ss. 163 and 164.

By this Article challenges to the polls, (*capita*), or exceptions to particular Jurors, are divided, as heretofore, into *peremptory* challenges, and challenges *for cause*; the accused, under clauses 1, 2, and 3, being allowed peremptory challenges, to the number of twenty, in treason and in capital offences; to the number of twelve in other lesser offences punishable with more than five years imprisonment; and to the number of four in offences punishable with five years imprisonment or less; and the Crown, under clause 9, being allowed four peremptory challenges and the right to stand aside any number of Jurors, in all cases.

The challenges for cause are unrestricted in number either as to the prosecutor or the accused. The grounds of such challenges are enumerated in clause 4, and may be placed under three heads, as follows:—FIRST, that the Juror is (*a*)

an alien, or (*b*) a person whose name is not on the panel, (either of which would, under the old law, have come under the head of *propter defectum*) ; SECOND, that the Juror is one who has been convicted either of a capital offence, or of an offence for which he has been sentenced to any term of imprisonment with hard labor, or any term exceeding twelve months, (which, under the old law, would have come under the head of *propter delictum* ; and THIRD, that the Juror is not indifferent, (which, under the old law, would have come under the head of *propter affectum*).

Challenges to the polls on the ground of the Juror being *un-indifferent*, that is to say, on the ground of some *presumed* or *actual* partiality in the Juror, seem to answer to the *recusatio judicis* in the civil and canon law, by the constitution of which a *judex* might be refused upon any suspicion of partiality ; (1) and such challenges, like those to the array, may be either *principal* or *for favor* ; it being laid down as a principal cause of challenge for unindifference or partiality that the Juror is of kin to either party within the ninth degree. (2)

Where the prosecutor or party aggrieved was the uncle of the sheriff of the district, it was held that the sheriff was incompetent to make the jury panel and that this objection gave rise to a challenge to the array, the nullity of the panel under such circumstances being held to be absolute and not relative. (3)

Challenges to the polls *for favor* are where, although the Juror is not so manifestly partial as to render him liable to a principal challenge, there are, nevertheless, reasonable grounds for suspicion that he will act under some prejudice, bias, or undue influence ; as, where he has said that he would hang the prisoner, if on his Jury, (4) or, where he has been entertained in the house of the party, or has been arbitrator in the same matter ; or where the Juror and the party are fellowservants, or where there exists any other cause, such as would constitute in the case of the sheriff a ground of challenge *to favor* to the whole panel. (5)

A challenge to the polls *for cause* may be made orally, unless the Court, as provided by clause 6 of the above Article, requires it to be in writing.

For form of challenge to the polls, (From LL), see p. 663, *post*.

In the case of a principal challenge for partiality, if the partiality be made apparent to the satisfaction of the Court, the challenge, it appears, may be at once allowed, and the Juror set aside. (6) But in the case of a challenge for partiality *not* a principal one but *for favor*, or where it is a challenge for cause of alienage or of being a convicted offender, it is tried by triers as directed by clause 8 of the above article.

It may be observed that no challenge of triers is admissible. (7)

If a challenge be made to the first Juror called, the Court may, as provided by clause 8 of the above Article, appoint as triers, any two persons present. If they find against the challenge, the Juror will be sworn, and be joined with the two triers in determining the next challenge, (8) unless before another challenge is made, another Juror be sworn ; for as soon as two or more Jurors are sworn the two triers selected by the Court are dispensed with ; and if after more than two Jurors are sworn there are any further challenges they will, according to clause 8 of the above Article, be referred to the two Jurors last sworn.

The trial of a challenge proceeds by witnesses called to support or defeat it.

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(1) 3 Bl. Com. 361 ; Cod, 3, 1, 16.
(2) Onions v. Nash, 7 Price, 263 ; Hewitt v. Fernely, 1b. 234.
(3) R. v. Rouleau, 14 L. N. 110.
(4) Whelan v. R , 28 U. C., Q. B., 29.
(5) Co. Litt. 157*b* ; Bac. Abr Juries (E.) 5.
(6) Arch. Cr. Pl. & Ev. 21 Ed. 177.
(7) *Ib.*
(8) 2 Hale, 275 ; Co. Litt. 158 *a* ; Bac. Abr., Juries (E) 12.

The Juror objected to may also be examined on the *voir dire* as to his partiality, or his alienage, etc., as the case may be.

The form of oath to a trier is as follows :—

"You shall well and truly try whether A. B., one of the Jurors, stands indifferent between Our Sovereign Lady the Queen and the prisoner at the bar (*or* "is an alien," etc.,) and a true verdict give according to the evidence.—So help you God."

The form of oath to be administered to a witness, sworn to give evidence before the triers, is as follows :—

"The evidence which you shall give to the court and triers upon this inquest shall be the truth, the whole truth, and nothing but the truth.—So help you God."

The form of oath to be administered to the challenged Juror, when examined on the *voir dire* is as follows :—

"You shall true answers make to all such questions as the Court shall demand of you.—So help you God."

Besides the objections or exceptions which may be taken to particular Jurors by way of challenge, for the purpose of excluding them from serving, there are also other causes which may be invoked by the Jurors themselves, but which are matters of exemption whereby their services are not excluded but excused. (1)

There may also be cases in which the court, without challenge taken, may and ought to excuse a Juryman on the panel when called, if he is obviously unfit to perform his duty, from physical or mental infirmity, or *semble*, from expressed un-indifferency. (2)

A Juryman must be challenged before he is sworn, and cannot afterwards be withdrawn, except by consent. (3)

669. Right to stand Jurors aside in libel cases.—The right of the Crown to cause any Juror to stand aside until the panel has been gone through shall not be exercised on the trial of any indictment or information by a private prosecutor for the publication of a defamatory libel. R.S.C., c. 174, s. 165.

670. Peremptory challenges in case of a mixed Jury.—Whenever a person accused of an offence for which he would be entitled to twenty or twelve peremptory challenges as hereinbefore provided elects to be tried by a Jury composed of one half of persons skilled in the language of the defence under sections six hundred and sixty-four or six hundred and sixty-five, the number of peremptory challenges to which he is entitled shall be divided, so that he shall only have the right to challenge one half of such 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.

671. Prisoners joining and severing in challenges. — If several accused persons are jointly indicted and it is proposed to try them together, they or any of them may either join in their challenges, in which case the persons who so join shall have only as many challenges as a single person would be entitled to, or each may make his

(1) 3 Steph. Com., 7 Ed., 525.
(2) Mansell v. R., 8 E. & B. 54 ; Dears & B. 375 ; 27 L. J. (M. C.) 4.
(3) R. v. Coulter, 13 U. C., C. P., 301 ; R. v. Mellor. 4 Jur. N. S. 214.

challenges in the same manner as if he were intended to be tried alone.

672. Ordering a tales.—Whenever after the proceedings hereinbefore provided the panel has been exhausted, and a complete Jury cannot be had by reason thereof, then, upon request made on behalf of the Crown, the court may order the sheriff or other proper officer forthwith to summon such number of persons whether qualified Jurors or not as the Court deems necessary and directs in order to make a full Jury ; and such Jurors may, if necessary, be summoned by word of mouth.

2. The names of the persons so summoned shall be added to the general panel, for the purposes of the trial, and the same proceedings shall be taken as to calling and challenging such persons and as to directing them to stand by as are hereinbefore provided for with respect to the persons named in the original panel. R.S.C., c. 174, s 168

673. Jurors not to Separate in capital cases.—The trial shall proceed continuously, subject to the power of the Court to adjourn it. Upon every such adjournment the Court may in all cases, 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.

2. No formal adjournment of the Court shall hereafter be required and no entry thereof in the Crown book shall be necessary.

On a trial for murder, before Maule, J., it was, after the opening address of the counsel, discovered that, in consequence of the detention of the railway train, the witnesses for the prosecution had not arrived in the City, and therefore, the trial was adjourned, the Jury were locked up, a fresh Jury was called into the Jury box, and another case was proceeded with. (1)

Where, before verdict an objection was taken that a Juror had been sworn in a wrong name, the same learned Judge intimated that the proper course was to discharge the Jury, and try the prisoners again. (2)

Where in the course of the proceedings at a trial it was discovered that one of the Jurors was related to the prisoner, it was held that the trial must proceed, as the fact of such relationship was only a ground of challenge. (3)

A prisoner on trial was, by sudden illness, rendered incapable of remaining at the bar, whereupon the Jury were discharged, and the prisoner on recovering was tried before another Jury ; (4) and, in another case, where the prisoner became ill and was carried out of Court, the Judge discharged the Jury, and was of opinion that, if the prisoner so taken ill should recover during the Assizes, he might be put on trial again, the proceedings being, of course, begun *de novo*. (5)

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(1) R. v. Foster, 3 C. & K. 201.
(2) R. v. Metcalf, MS., Arch. Cr. Pl. & Ev. 21 Ed. 185.
(3) R. v. Wardle, C. & Mar. 647.
(4) R. v. Stevenson, 2 Leach, 546.
(5) R. v. Streek, 2 C. & P. 413.

Where on the trial of an indictment for perjury the defendant was taken ill during the trial he was allowed to absent himself from the Court until his recovery, and the trial proceeded in his absence. (1)

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.

675. Saving of Power of Court.—Nothing in this Act shall alter, abridge or affect any power or authority which any court or Judge has when this Act takes effect, or any practice or form in regard to trials by Jury, Jury process, Juries or Jurors, except in cases where such power or authority is expressly altered by or is inconsistent with the provisions of this Act. R.S.C., c. 174, s. 170.

Where, in the course of a trial, one of the Jurors without obtaining leave, left the Jury box, and also went out of the Court, whereupon the Jury was discharged, and a fresh one empanelled for the trial of the prisoner, it was held that this was the only course that could have been adopted. (2) And, so, where in the course of a trial it was discovered that there was on the Jury a person who was not on the Jury panel, and who had by mistake been summoned as a Juryman, the Jury were discharged and a fresh Jury constituted by taking another Juryman in the place of the one who had served in mistake. (3)

If one of the Jury die before the delivery of the verdict the remaining eleven will be discharged, and a new Jury may be at once sworn, or a new Juror may be added to the eleven and the defendant tried by them, or (if necessary) he may be remanded to the next Assizes. (4) So, also, if one of the Jurors be taken so ill that he is not able to proceed with the trial (5)

In case of another Juror being so added to the eleven, they must be sworn anew; and the prisoner must again have his challenges. (6)

In the course of a trial for murder the Jury was discharged, because it was discovered that one of them had come from a house where there was small pox. On the case being resumed, next day, before another Jury, it was contended on behalf of the prisoner that he had already been put in jeopardy and could not be tried again: but the objection was over-ruled, and the trial proceeded with. (7)

See Article 728, *post*, as to discharging Jury, when they are unable to agree.

676. Proceedings when previous offence charged.—The proceedings upon any indictment for committing any offence after a previous conviction or convictions, shall be as follows, that is to say: the offender shall, in the first instance, be arraigned upon so 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

(1) R. v. Orton, *alias* Castro, Queen's Bench, July 1873, MS.; Arch. Cr. Pl. & Ev 21 Ed. 163.
(2) R. v. Ward, 10 Cox, 573.
(3) R. v. Philips, 11 Cox, 142.
(4) R. v. Gould, 3 Burn's J., 30th Ed. 98.
(5) R. v. Scalbert, 2 Leach, 620.
(6) R. v. Edwards, R. & R. 224; 4 Taunt. 309.
(7) R. v. Considine, 8 L. N. 307.

finds him guilty, or if, on arraignment he pleads guilty, he shall then, and not before, be asked whether he was so previously convicted as alleged in the indictment; and if he answers that he was so previously convicted, the Court may proceed to sentence him accordingly, but if he denies that he was so previously convicted, or stands mute of malice, or will not answer directly to such question the Jury shall then be charged to inquire concerning such previous conviction or convictions, and in such case it shall not be necessary to swear the Jury again, but the oath already taken by them shall, for all purposes, be deemed to extend to such last mentioned inquiry: Provided, that if upon the trial of any person for any such subsequent offence, such person gives evidence of his good character, the prosecutor may, in answer thereto, give evidence of the conviction of such person for the previous offence or offences, before such verdict of guilty is returned, and the Jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence.

See comments under Article 478, at pp. 432, 433, *ante*, as to second offences, in general. See Article 628, p. 590, *ante*, as to matters to be alleged in an indictment charging a previous conviction; and, see also pp. 471, 491, and 492, *ante*, for forms of indictment charging a previous conviction. See Article 694, *post*, as to proof of a previous conviction.

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.

678. Compelling attendance of witness.—Upon proof to the satisfaction of the judge of the service of the subpœna upon any witness who fails to attend or remain in attendance, or upon its appearing that any witness at the preliminary examination has entered into a recognizance to appear at the trial, and has failed so to appear, and that the presence of such witness is material to the ends of justice, the judge may, by his warrant, cause such witness to be apprehended and forthwith brought before him to give evidence and to answer for his disregard of the subpœna; and such witness may be detained on such warrant before the judge or in the common gaol with a view to secure his presence as a witness, or, in the discretion of the judge, he may be released on a 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.

679. Witness in Canada but beyond Jurisdiction of Court.—If any witness in any criminal case, cognizable by indictment in any court of criminal jurisdiction at any term, sessions or sittings of any court in any part of Canada, resides in any part thereof, not within the ordinary jurisdiction of the Court before which such criminal case is

cognizable, such court may issue a writ of subpœna, directed to such witness, in like manner as if such witness was resident within the jurisdiction of the court; and if such witness does not obey such writ of subpœna the court issuing the same may proceed against such witness for contempt or otherwise, or bind over such witness to appear at such days and times as are necessary, and upon default being made in such appearance may cause the recognizances of such witness to be estreated, and the amount thereof to be sued for and recovered by process of law, in like manner as if such witness was resident within the jurisdiction of the court R.S.C., c. 174, s. 212.

680. Procuring attendance of a prisoner as a witness.—When the attendance of any person confined in any prison in Canada, or upon the limits of any gaol, is required in any court of criminal jurisdiction in any case cognizable therein by indictment, the court before whom such prisoner is required to attend may, or any judge of such court, or of any superior court or county court 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, to deliver such prisoner to the person named in such order to receive him; and such person 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. R.S.C., c. 174, s. 213.

681. Evidence, under commission, of person dangerously ill.—Whenever it is made to appear at the instance of the Crown, or of, the prisoner or defendant, to the satisfaction of a Judge of a superior court, or a judge of a county court having criminal jurisdiction, that any person who is dangerously ill, and who, in the opinion of some licensed medical practitioner, is not likely to recover from such illness, is able and willing to give material information relating to any indictable offence, or relating to any person accused of any such offence, such judge may, by order under his hand appoint a commissioner to take in writing the statement on oath or affirmation of such person.

2. Such commissioner shall take such statement and shall subscribe the same and add thereto the names of the persons, if any, present at the taking thereof, and if the deposition relates to any indictable offence for which any accused person is already committed or bailed to appear for trial shall transmit the same, with the said addition, to the proper officer of the court at which such accused person is to be tried; and in every other case he shall transmit the same to the clerk of the peace of the county, division or city in which he has taken the same, or to such other officer as has charge of the records and proceedings of a superior court of criminal jurisdiction in such county, division or city, and such clerk of the peace or other officer shall preserve the same and file it of record, and upon order of the court or of a judge transmit the same to the proper officer of the court where the same shall be required to be used as evidence. R.S.C., c. 174, s 220.

682. Presence of prisoner at examination under commission.—Whenever a prisoner in actual custody is served with, or receives, notice of an intention to take the statement mentioned in the last preceding section the judge who has appointed the commissioner may, by an order in writing, direct the officer or other person having the custody of the prisoner to convey him to the place mentioned in the said notice for the purpose of being present at the taking of the statement; and such officer or other person shall convey the prisoner accordingly, and the expenses of such conveyance shall be paid out of the funds applicable to the other expenses of the prison from which the prisoner has been conveyed. R.S.C., c. 174, s. 221.

683. Evidence out of Canada may be taken by commission.—Whenever it is made to appear, at the instance of the Crown, or of the prisoner or defendant, to the satisfaction of the judge of any superior court, or the judge of a county court having criminal jurisdiction, that any person who resides out of Canada is able to give material information relating to any indictable offence, for which a prosecution is pending, or relating to any person accused of such offence, such judge may, by order under his hand, appoint a commissioner or commissioners to take the evidence, upon oath, of such person.

2. Until otherwise provided by rules of court the practice and procedure in connection with the appointment of commissioners under this section, the taking of depositions by such commissioners, and the certifying and return thereof, and the use of such depositions as evidence at the trial, shall be, as nearly as practicable, the same as those which prevail in the respective courts in connection with the like matters in civil causes. 53 V., c. 37, s. 23.

684. Cases in which evidence of one witness must be corroborated.—No person accused of an offence under any of the hereunder mentioned sections shall be convicted upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused:

(*a*) Treason, Part IV., section sixty-five;

(*b*.) Perjury, Part X., section one hundred and forty-six;

(*c*.) Offences under Part XIII., sections one hundred and eighty-one to one hundred and ninety inclusive;

(*d*.) Procuring feigned marriage, Part XXII., section two hundred and seventy-seven;

(*e*.) Forgery, Part XXXI., section four hundred and twenty-three.

685. Evidence of child not under oath.—Where, upon the hearing or trial of any charge for carnally knowing or attempting to carnally know a girl under fourteen or of any charge under section two hundred and fifty-nine for indecent assault, the girl in respect of whom the offence is charged to have been committed, or any other child of tender years who is tendered as a witness, does not, in the

opinion of the court or justices, understand the nature of an oath, the evidence of such girl or other child of tender years may be received though not given upon oath if, in the opinion of the court or justices, as the case may be, such girl or other child of tender years is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.

2. But no person shall be liable to be convicted of the offence, unless the testimony admitted by virtue of this section, and given on behalf of the prosecution, is corroborated by some other material evidence in support thereof, implicating the accused.

3. Any witness whose evidence is admitted under this section, is liable to indictment and punishment for perjury in all respects as if he or she had been sworn. 53 V., c. 37, s. 13.

Section 4 of the Imperial Act 48 & 49 Vict., c. 69 makes it a felony to carnally know a girl under thirteen years of age; and it contains a clause similar to the above Article 685, allowing a child against whom an offence under that section has been committed, to be examined and give evidence without being sworn, upon the hearing of the charge but it contains no provision for examining the child when the charge is only one of indecent assault. Still, in a case where the prisoner was indicted for unlawfully and carnally knowing a girl of six years of age, and the child gave her evidence without being sworn, and the Jury acquitted the prisoner of the charge of *unlawfully and carnally knowing* but found him guilty of an indecent assault, the conviction was affirmed by the Court consisting of Lord Coleridge, C. J., and Manisty, J., Hawkins, J., Matthew, J., and Smith, J., overruling the defendant's objection to the effect that the conviction for indecent assault could not be supported because there being nothing in the statute to make the child's evidence, without oath on a charge of indecent assault, admissible, that evidence should be rejected and there was no other evidence to support the conviction. (l)

686. Deposition of a sick witness may be read in evidence.—If the evidence of a sick person has been taken under commission as provided in section six hundred and eighty-one, and upon the trial of any offender for any offence to which the same relates, the person who made the statement is proved to be dead, or if it is proved that there is no reasonable probability that such person will ever be able to attend at the trial to give evidence, such statement may, upon the production of the judge's order appointing such commissioner, be read in evidence, either for or against the accused, without further proof thereof,—if the same purports to be signed by the commissioner by or before whom it purports to have been taken, and if 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.

It seems that in view of the proviso at the end of this Article no statement, professedly taken under the provisions of this Article and Article 681, can be available as such at the trial, unless, before taking it, notice has been given of

(l) R. v. Wenland, 11 L. N. 147.

the intention to take it; (1) and such notice must be in writing; otherwise the statement cannot, at the trial, be read against the prisoner, although he may have been present when it was taken and had a full opportunity of cross-examination. (2)

687. Depositions taken at preliminary enquiry may be read in evidence.—If upon the trial of any accused person it is proved upon the oath or affirmation of any credible witness that any person whose deposition has been taken by a justice in the preliminary or other investigation of any charge is dead, or so ill as not to be able to travel, or is absent from Canada, and if it is also proved that such deposition was taken in the presence of the person accused, and that he, his counsel or solicitor, had a full opportunity of cross-examining the witness, then if the deposition purports to be signed by the justice by or 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 justice purporting to have signed the same. R.S.C., c. 174, s. 222.

This Article is taken from section 17 of the Imperial statute 11 & 12 Vict. c. 42.

It has been held that the words, "so ill as not to be able to travel" do not mean that the witness's coming to give evidence on the trial shall actually endanger his life, but that he is not reasonably fit, from illness, to attend. (3)

A witness came to the Assize town, and into Court, but, a short time before the trial commenced, he left the Court to return to his home, by the advice of a medical man, who deposed that in his judgment, it would have been highly dangerous for the witness to remain. While the trial was going on the witness was on his way home Channell, Serj., after consulting with Parke, B., held that the witness was "so ill as not be able to travel," and that his deposition before the committing magistrate might be read in evidence. (4)

It is for the presiding judge at the trial to decide, in his discretion, whether the evidence that the witness is too ill to travel is sufficient; and such evidence need not *necessarily* come from a medical man. (5)

Where it was proposed to put in the deposition of an absent witness on the ground that he was "so ill as not to be able to travel," and the evidence of such inability was that of a medical man, who said that he had last seen the witness on the Monday (the trial being on the Wednesday next following), and that he was then recovering from a severe attack of pain in the bowels and was too feverish then to travel, but, that it was possible for him to have sufficiently recovered by the Wednesday to have travelled, although he (the medical man) would not have advised it, Blackburn, J., refused to admit the deposition, on the ground that no one had seen the witness for 48 hours, and that he might have become sufficiently recovered in that period. (6)

Unless there is actual illness, old age and nervousness and inability to stand a cross-examination are not enough foundation for the reading of the de-

(1) R. v. Quigley, L. T.. N. S., 211, Mellor and Lush, JJ.
(2) R. v. Shurmer, 17 Q. B D. 323; 55 L. J. (M. C.) 153.
(3) R. v. Riley, 3 C. & K. 116; R. v. Cockburn, Dears. & B. 203; 26 L. J. (M. C.) 136
(4) R. v. Wicker, 18 Jur. 252.
(5) R. v. Stephenson, L. & C. 165; 31 L. J. (M. C.), 147.
(6) R. v. Bull, 12 Cox, 31.

position of an absent witness, (1) even although the bringing such witness into court would be dangerous to his life. (2)

It seems to have been considered doubtful, in England, how far indisposition from recent childbirth is an illness within the meaning of the Statute. In one case, Willes, J., said, "It must not be supposed that the fact of a woman having been delivered nine days ago constitutes an illness within the meaning of the statute; but we have it in evidence that she was delivered of a dead child, which would tend to produce a morbid state of the body and therefore her deposition may be read." (3) In another case the same learned judge rejected the deposition of a woman who had been recently confined, and who it was sworn appeared to be very feeble and not able to come to the Assizes. His Lordship is reported to have said, in that case, that, "illness from confinement was an ordinary state, and not such an illness as is contemplated by the statute," and that Crowder, J., agreed with him. (4)

It has been held that there may be incidents in regard to the state of pregnancy which might bring the case within the statute. For instance, Bramwell, B., allowed the deposition of a married woman to be read on the evidence of her husband that she was unable to attend; although he was unable to say how far advanced she was, and although he admitted that she was about the house attending to her household duties as usual, and had prepared breakfast for him that morning, and had not been confined to bed; but, a fortnight before, she had suffered in consequence of having been driven to the Assize town. (5)

Where, however, it was proposed to put in the deposition of a married woman on the ground of pregnancy, there being no other illness, Mellor, J., said the matter had been much considered by the judges, and the general opinion of the bench was that inability to travel arising from pregnancy *alone* was not such an illness as was contemplated by the statute. (6)

It has, however, been since decided that pregnancy may be a source of such illness as to render the witness unable to travel, and an illness within the statute 11 and 12 Vic., c. 42, sec. 17. In the case in which it was so decided, no medical evidence was tendered as to the condition of the witness whose deposition was held by the Court of Criminal Appeal to have been rightly admitted, and the only evidence as to her condition was given by her husband who proved that he resided with his wife at a place 15 miles distant from the place of trial, and that when he left her on that morning she was unable to move about without considerable difficulty, that she was then lying down and had been so during the greater part of the past week, though able to get up for a few minutes at intervals. He further stated that his wife thought her confinement might not take place until the middle of the following week, but might, she also thought, occur at any hour. (7)

Where a medical man deposed that he had examined the witness that morning, that she was very near her confinement, and that it would have been dangerous to expose her to the excitement of attending a criminal trial; that two days previously there were symptoms of approaching labor and her confinement might take place at any moment, but that he could not say that her case differed in any way from any ordinary case of confinement,—Bowen, J., after consulting with Lush, J., admitted her deposition. (8)

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(1) R. v. Farrell, L. R., 2 C. C. R., 116; 43 L. J. (M.C.) 94.
(2) R. v. Thompson, 13 Cox, 181, Lush, J.
(3) R. v. Wilton, 1 F. & F. 309.
(4) R. v. Walker, 1 F. & F. 534.
(5) R. v. Croucher, 3 F. & F. 285.
(6) R. v. Parker & Ashworth, York Summer Assizes, 1862, MS.; and see R. v. Omant, 6 Cox, 496.
(7) R. v. Wellings, 3 Q. B. D. 426; 47 L. J. (M. C.) 100.
(8) R. v. Goodfellow, 44 Cox, 326.

On a trial for uttering forged notes it was proved that a witness,—who had lived at one time with the prisoner as his wife,—had left her lodgings and had since been heard from (several months ago), in the United States. Upon this proof, the witness's deposition, taken at the preliminary examination before the magistrate, was read at the trial. and, upon a case reserved, it was held that the admission of the deposition being in the discretion of the presiding judge it was not improperly received. (1)

Where a witness is so ill as not to be able to travel, the judge may, if he thinks fit, postpone the trial, instead of allowing the deposition to be read. (2)

688. Depositions may be used on trial for other offences.—Depositions taken in the preliminary or other investigation of any charge against any person may be read as evidence in the prosecution of such person for any other offence, upon the like proof and in the same manner, in all respects, as they may, according to law, be read in the prosecution of the offence with which such person was charged when such depositions were taken. R.S.C., c. 174, s. 224.

689. Evidence of accused's statement before the justice.—The statement made by the accused person before the justice may, if necessary, upon the trial of such person, be given in evidence against him without further proof thereof, unless it is proved that the justice purporting to have signed the same did not in fact sign the same. R.S.C., c. 174, s. 223.

As to the necessity of confessions made by a prisoner being free and voluntary, see comments and authorities under Article 592, at pp. 555-560, *ante*.

690. Admission may be taken on trial.—Any accused person on his trial for any indictable offence, or his counsel or solicitor, may admit any fact alleged against the accused so as to dispense with proof thereof.

691. Certificate of trial at which perjury was committed.—A certificate containing the substance and effect only, omitting the formal part, of the indictment and trial for any offence, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court whereat the indictment was tried, or among which such indictment has been filed, or by the deputy of such clerk or other officer, shall, upon the trial of an indictment for perjury or subornation of perjury, be sufficient evidence of the trial of such indictment without proof of the signature or official character of the person appearing to have signed the same. R.S.C., c. 174, s. 225.

692. Evidence of coin being false or counterfeit.—When upon the trial of any person, it becomes necessary to prove that any coin produced in evidence against such person is false or counterfeit, it shall not be necessary to prove the same to be false and counterfeit by the evidence of any moneyer or other officer of Her Majesty's Mint, or other person employed in producing the lawful coin in Her Majesty's dominions or elsewhere, whether the coin counterfeited is

(1) R. v. Nelson, 1 O. R. 500.
(2) R. v. Tait, 2 F. & F. 353, per Crompton, J.

current coin, or the coin of any foreign prince, state or country, not current in Canada, but it shall be sufficient to prove the same to be false or counterfeit by the evidence of any other credible witness. R.S.C., c. 174, s. 229.

693. Evidence on proceedings for advertising counterfeit money.—On the trial of any person charged with the offences mentioned in section four hundred and eighty, any letter, circular, writing or paper offering or purporting to offer for sale, loan, gift or distribution, or giving or purporting to give information, directly or indirectly, where, how, of whom or by what means any counterfeit token of value may be obtained or had, or concerning any similar scheme or device to defraud the public, shall be *primâ facie* evidence of the fraudulent character of such scheme or device.

694. Proof of previous conviction.—A certificate containing the substance and effect only, omitting the formal part, of any previous indictment and conviction for any indictable offence, or a copy of any summary conviction, purporting to be signed by the clerk of the Court or other officer having the custody of the records of the Court before which the offender was first convicted, or to which such summary conviction was returned, or by the deputy of such clerk or officer, shall, upon proof of the identity of the person of the offender, be sufficient evidence of such conviction without proof of the signature or official character of the person appearing to have signed the same. R.S.C., c. 174, s. 230.

695. Proof of conviction of a witness.—A witness may be questioned as to whether he has been convicted of any offence, and upon being so questioned, if he either denies the fact or refuses to answer the opposite party may prove such conviction; and a certificate, as provided in the next preceding section, shall, upon proof of the identity of the witness as such convict, be sufficient evidence of his conviction, without proof of the signature or the official character of the person appearing to have signed the certificate. R.S.C., c. 174, s. 231.

Section 5 of the *Canada Evidence Act* 1893 provides that no person shall be excused from answering any question on the ground that his answer may tend to criminate him; but it also provides that no evidence so given shall be used against such person in any criminal prosecution thereafter instituted against him other than a prosecution for perjury in giving such evidence.

696. Proof of attested instrument.—It shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite; and such instrument may be proved by admission or otherwise as if there had been no attesting witness thereto. R.S.C., c. 174, s. 232.

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.

699. Discrediting a party's own witness.—A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the court, proves adverse, such party may contradict him by other evidence, or, by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony; but before such last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make such statement. R.S.C., c. 174, s. 234,

The word "adverse" in this Article means "hostile," and not merely "unfavorable". (1)

Where, on a trial for rape, a witness for the prosecution,—to whom the prosecutrix had, shortly after the commission of the alleged offence, made a communication,—being asked on cross-examination as to the particulars of such communication, gave an answer different from that which the prosecuting counsel was instructed was the truth, it was held by Day, J., (after consulting Cave, J.), that the prosecuting counsel had the right, on re-examination to ask the witness, under 28 & 29 Vict. c. 18, sec. 3 (which is to the same effect as the above Article 599), whether she had not at another time made a statement inconsistent with her present testimony to a person named, and also to call such person to give evidence of the statement so made to him. (2) In that case the prisoner's counsel objected that there was nothing in the character of the witness to show that she was hostile, and the report does not state whether the learned judges considered her to be so.

700. Evidence of former written statements by witness.—Upon any trial a witness may be cross-examined as to previous statements made by him in writing, or reduced to writing, relative to the subject-matter of the case, *without such writing being shown to him*; but if it is intended to contradict the witness by the writing his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him; and the judge, at any time during the trial, may require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he thinks fit: Provided that a deposition of the witness, purporting to have been taken before a justice on the investigation of the charge and to be signed by the witness and the justice, returned to and produced from the custody of the proper

(1) Grenough v. Eccles, C. B., N. S., 786; 28 L. J. (C.P.) 160.
(2) R. v. Little, 15 Cox, 319.

officer, shall be presumed *primâ facie* to have been signed by the witness. R.S.C., c. 174, s. 235.

This Article is a re-enactment of sec. 235, R.S.C., c. 174, and was originally taken from sec. 5 of the Imperial statute 28 and 29 Vict. c. 18. Before the passing of that Act the rule was that if a previous statement of a witness were in writing, it was irregular to question him as to the contents of it, without first producing it, and, after asking him if it were his handwriting, putting it in evidence; so that a witness could not be asked whether he did or did not state a particular fact before the Magistrate, without first allowing him to read or have read to him his deposition; (1) and in the Queen's case it was held that in cross-examination, a witness could not be asked if he had ever written a letter or other writing to the effect of so and so, but that he must first have been shewn the letter or writing, and then if he admitted it to be his, it must have been put in evidence; or that a portion of the letter or writing could have been shewn to him and he could then have been asked if he wrote it, but if he did not admit it he could not be cross-examined upon its contents; and even if he admitted it to be his letter or writing he could not have been questioned as to whether such and such statements were contained in it, but the entire letter must first have been put in evidence. (2)

The above rule, while it was in force, excluded one of the best tests by which the memory and integrity of a witness can be tried. (3) It was abrogated by sec. 5 of 28 and 29 Vic., c. 18; so that, now, a witness may be cross-examined either as to his statements before the Magistrate or as to any other previous statement made by him in writing, without his deposition or the writing being shewn to him; or the crossexamining counsel may, if he thinks fit, put the witness's deposition in his hand for the purpose of cross-examining him upon it, without reading it as part of the evidence of the cross-examining party, but the latter will be bound by the answer of the witness, unless the deposition is put in to contradict him; and it is not admissible to state that the deposition does contradict him unless it is so put in. (4)

If the former declaration of the witness were not in writing but merely by parol you might, even before the 28 and 29 Vict., c. 18, s. 5, and still may cross-examine him on the subject of it; and if he deny it you may call another witness to prove it. (See Article 701 *post.*) So if a witness admit that, when before the magistrates, he was cross-examined for the prisoner, and it appears that such cross-examination is not returned with the depositions, he may and he might, even before the enactment above mentioned be questioned by the prisoner's counsel as to the answers he gave. (5)

If it appear that a statement of the witness before the magistrate, although written down by him, was not read over to the witness, nor signed by him or by the Magistrate, the witness may and he might even before the 28 and 29 Vic., c. 18, s. 5, be cross-examined as to such statement, without producing the writing. (6)

Witnesses for the prosecution were duly sworn and examined before the Magistrate and cross-examined by the prisoner; minutes thereof were duly made by the Magistrate's clerk, and then sent to his office to be copied as draft depositions. The witnesses attended there also. T., the copying clerk, while copying the minutes, asked the witnesses some questions for the purpose of making the depositions more correct, clear and complete, and inserted their answers to such questions in the depositions. The prisoner was not then

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(1) R. v. Taylor, 8 C. & P. 726.
(2) The *Queen's Case*, 2 Brod. & B. 286, 288.
(3) Tayl. Ev. s. 1301.
(4) R. v. Riley, 4 F. & F. 964; R. v. Wright, 4 F. & F., 967.
(5) R. v. Edwards, 8 C. & P. 26; R. v. Curtis, 2 C. & K. 763.
(6) R. v. Griffiths, 9 C. & P. 746; See Jeans v. Wheeldon, 2 M. & Rob. 486.

present. The depositions thus written were sent back to the Magistrate; and the witnesses in the presence of the prisoner, after being resworn, and after hearing the depositions read over to them and full opportunity for cross-examination being given to the prisoner, signed them At the trial, a material question was put to one of the witnesses as to something which he had said to T., in answer to one of the questions so put to him by T. It was held that such answer formed no part of the depositions but was wholly independent of them, and therefore that the question might be asked without putting in the depositions. (1)

So, also, a witness may be cross-examined as to his statement before the Grand Jury in the same case. (2)

If a witness, when examined in chief as to the occurrence of a fact, answer that he does not remember it, the counsel on the opposite side cannot give evidence of a former declaration by the witness of the fact having occurred unless he have in cross-examination questioned the witness as to such a declaration; for the fact may have occurred and the witness have formerly declared his knowledge of it, and yet he may not recollect it at the time of his examination. (3)

As a general rule a witness cannot be cross-examined as to any distinct collateral fact, not relevant to the matter in issue, for the purpose of disproving the truth of the expected answer by other witnesses, in order to discredit the whole of his testimony. (4)

As to variations between a witness's, deposition and his evidence at the trial, Cockburn, C. J., recently said that he did not attach much importance to the accordance between what a witness said at the trial and what he was reported in his deposition to have said before the Magistrate. He knew from his own experience, how difficult it was to take down a witness's, exact words. A witness expressed himself in a long sentence, the magisrate's clerk struck out a particular word, and with that omission it went down on the notes and was not the whole sentence. The whole meaning of the sentence which the witness had uttered might thereby be entirely altered. Too much importance ought not, therefore, to be attached to such variations, and if there was a substantial agreement between the evidence at the preliminary enquiry and that adduced at the trial that was sufficient. (5)

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.

702. Evidence of a place being a common gaming house. — When any cards, dice, balls, counters, tables or other instruments of gaming used in playing any unlawful game are found in any house, room or place suspected to be used as a common gaming-house, and entered under a warrant or order issued under this Act, or about the person

(1) R. v. Christopher, 1 Den 536; 2 C. & K. 994, 995; 19 L. J. (M. C.) 101.
(2) R. v Gibson, C. & Mar. 672
(3) *The Queen's case*, 2 Brod. & B. 292.
(4) Spencely v De Willott, 7 East, 108.
(5) R. v. Wainwright, 13 Cox, 171, 173.

of any of those who are found therein, it shall be *primâ facie* evidence, on the trial of a prosecution under section *one hundred and ninety-eight*. 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 chief constable, deputy chief constable or other officer entering the same under a warrant or order issued under this Act, or in the presence of those persons by whom he is accompanied as aforesaid. R.S.C., c. 158., s. 4.

For provisions as to search warrants, see Article 575, p. 542, *ante*.

703. Other evidence that place is a Common Gaming House.—It shall be *primâ facie* evidence in any prosecution for keeping a common gaming-house under section *one hundred and ninety-eight* of this Act 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. R.S.C., c. 158, s. 8.

By the wording of these Articles, 702 and 703, the provisions thereof are *expressly* made applicable to prosecutions under Article 198, *ante*, for the *indictable* offence of *keeping* a common gaming house, etc., but there is no mention therein, by *express* words, of prosecutions under Article 199, *ante*, for the *non-indictable* offence of *playing* or *looking on at play* in a gaming house. For instance, Article 702 provides that, on the trial of a prosecution under Article 198, the fact of cards or other gaming instruments being found in a suspected gaming house when entered under a search warrant shall be *prima facie* evidence that it is a gaming house. It then, however, goes on to say that the same fact shall be *prima facie* evidence also that persons found in such house were playing therein; and, therefore, although Article 199 is not *expressly* mentioned, it may, with good reason, be contended that prosecutions thereunder are included, by necessary implication, and that, upon a summary trial of persons prosecuted under Article 199 for playing or looking on at play in a gaming house, the fact of such persons being found in a searched house when gaming instruments are found therein should be admitted as *prima facie* evidence that they were playing in such house.

With regard to warrants to search houses suspected of being common gaming houses, etc, Article 575 provides that such a warrant may be issued to the *chief-constable* or *deputy chief-constable* of any *city* or *town*; and by clauses 4 and 5, it defines the expression "chief constable" as including the *chief of police, city marshal* or *other head* of the *police force* of any *city, town or place*, and the expression "deputy chief-constable" as including the *deputy chief of police*, etc., of any *city, town or place*.

It would appear, therefore, that such search warrants are only to be issued to and executed by the *head* or *deputy head* of a *police force* of a *city, town*, or place, (the word "*place*" being probably meant to include places under the control of the head of a provincial or a county police force), and that, under the terms of Article 575, they cannot be issued to or executed by, for instance, the

high constable or deputy high constable of the district of Montreal, (who seems to be more of a head or chief bailiff of the Criminal Courts than a police officer) nor by any other constable or officer unconnected with and not occupying the position of *head* or *deputy head* of the police force of a city town or the head or deputy head of a provincial or county police force.

But, *quaere*, suppose a constable or other peace officer not occupying the position of *head* or *deputy head* of a *police force*, were to receive and act upon such a warrant, and to find, on entering the suspected premises, a number of gaming instruments and some persons engaged there in playing, would he not have the right, (independently of any warrant), to apprehend such persons, under the authority of clause 3 of Article 552, *ante*, which provides that ANY PEACE OFFICER may arrest, *without warrant*, any one whom he finds committing an offence against this Act ? Or, would the fact of such constable, or peace officer not being the proper officer authorized by Article 575 to receive and act upon a warrant to search a suspected gaming house debar him from making any valid arrest of persons found in the premises entered by him by virtue of such a warrant ?

A case somewhat in point has just arisen, in the city of Montreal. On the 14th October 1893, a warrant was issued, (under Article 575), by Police Magistrate Dugas to Deputy High Constable Bissonnette to search premises alleged to be kept by one Maloney as a common gaming house. Under this warrant Bissonnette with the assistance of several other officers entered the premises and found therein a number of gaming instruments consisting of cards, dice, balls, counters, roulette tables, card cutters or markers, etc., and five or six persons seated at a gaming table. The officers seized and carried away the gaming instruments together with several thousand dollars in cash and they apprehended Maloney and the five or six persons found in the premises On the following Monday (16th October). Maloney was charged under article 198 with the indictable offence of keeping a gaming house and Judge Dugas, after fixing a time for holding the preliminary investigation and after hearing special evidence as to the nature of the articles seized, ordered the destruction of the gaming instruments and the confiscation of the monies. With regard to the persons found in the premises, they were brought before Police Magistrate Desnoyers to be summarily tried under article 199 with the non-indictable offence of having been found playing in a common gaming house The counsel for the defendants raised the objection that Bissonnette the Deputy High Constable was not such an officer as is authorized under Article 575 to receive and execute a warrant to search a suspected gaming house, inasmuch as he was only a Deputy High Constable in connection with the Criminal Courts and not the head or deputy head of any police force, but that the proper officer to receive and execute such a warrant was the Chief or Deputy Chief of the police force of the City of Montreal, that the warrant and the entry thereunder of the premises in question being illegal, the arrest made at the same time of the defendants was also illegal and that therefore they could not be legally tried upon the charge preferred against them.

Judge Desnoyers took a note of the objection, the defendants pleaded not guilty, the trial was proceeded with, and at its close the Judge reserved his decision until the 23rd October 1893, when he rendered judgment against the defendants finding them guilty of being found playing in a gaming house and imposing a fine upon each. He held that whatever force there might be in the objections raised by the defendants' counsel they were of no avail in the case against the defendants, although they might be found to have some value in that branch of the transaction which related to the case against Maloney, as the keeper of the house, and in deciding that the defendants were regularly before him, he relied upon Articles 22, 24, 552, 557 and 843 and particularly upon Article 24, " which," he said, " gives any private individual the right of arresting *without warrant* any person whom he finds committing an offence," and Article 577 which (when read in connection with Article 843) provides that when any person accused of an offence is before a justice whether voluntarily or upon summons

or after being apprehended *with or without a warrant*, the Justice shall proceed to enquire into the matters charged against such person. (1)

Sections 9 and 10 of R. S. C., chap. 158, (which are unrepealed), empower a Police Magistrate to swear and examine, when brought before him, any persons found in any gaming house entered and searched under the provisions of Article 575. These sections are as follows :

"The police magistrate, mayor or justice of the peace, before whom any person is brought who has been found in any house, room or place, entered 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 the trial of any indictment, information, action or suit in anywise relating to such unlawful gaming or any such acts as aforesaid, or from answering any question put to him touching the matters aforesaid, on the ground that his evidence will tend to criminate himself; and any such person so required to be examined as a witness who refuses to make oath accordingly, or to answer any such question, shall be subject to be dealt with in all respects as any person appearing as a witness before any justice or Court in obedience to a summons or subpœna and refusing, without lawful cause or excuse to be sworn or to give evidence, may, by law, be dealt with ; but nothing in this section shall render any offender, under the sixth section of this Act, liable on his trial to examination hereunder." (Sec. 9.)

"Every person so required to be examined as a witness, who, upon such examination, makes true disclosure ; to the best of his knowledge, of all things as to which he is examined shall receive from the judge, justice of the peace, magistrate, examiner or other judicial officer before whom such preceding 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." (Sec. 10.)

704. Evidence in cases of Gaming in stocks, etc. — Whenever, on the trial of a person charged with making an agreement for the sale or purchase of shares, goods, wares or merchandise in the manner set forth in section two hundred and one, it is established that the person so charged has made or signed any such contract or agreement of sale or purchase, or has acted, aided or abetted in the making or signing thereof, the burden of proof of the *bonâ fide* intention to acquire or to sell such goods, wares or merchandise, or to deliver or receive delivery thereof, as the case may be, shall rest upon the person so charged.

(1) R. v. Louis Aaron and others, Montreal Police Court, 23rd October 1893.

705. Evidence in certain cases of libel. —(*As amended by* 56 *Vic., c.* 32.) In any criminal proceeding commenced or prosecuted for publishing any extract from, or abstract of, any paper containing defamatory matter and which has been published by, or under the authority of, the Senate, House of Commons, or any Legislative Council, Legislative Assembly or House of Assembly, such paper may be given in evidence, and it may be shown that such extract or abstract was published in good faith and without ill-will to the person defamed, and if such is the opinion of the jury, a verdict of not guilty shall be entered for the defendant. R.S.C., c. 163, s. 8.

706. Evidence in cases of polygamy, etc. — In the case of any indictment under section two hundred and seventy-eight (*b*), (*c*) and (*d*), no averment or proof of the method in which the sexual relationship charged was entered into, agreed to, or consented to, shall be necessary in any such indictment, or upon the trial of the person thereby charged; nor shall it be necessary upon such trial to prove carnal connection had or intended to be had between the persons implicated. 53 V., c. 37, s. 11.

707. Evidence of stealing ores or minerals.—In any prosecution, proceeding or trial for stealing ores or minerals the possession, contrary to the provisions of any law in that behalf, or any smelted gold or silver, or any gold-bearing quartz, or any unsmelted or otherwise unmanufactured gold or silver, by any operative, workman or labourer actively engaged in or on any mine, shall be *primâ facie* evidence that the same has been stolen by him. R.S.C., c. 164, s. 30.

708. Evidence of stealing timber.—In any prosecution, proceeding or trial for any offence under section three hundred and thirty-eight a timber mark, duly registered under the provisions of the *Act respecting the Marking of Timber*, on any timber, mast, spar, saw-log or other description of lumber, shall be *primâ facie* evidence that the same is the property of the registered owner of such timber mark; and possession by the offender, or by others in his employ or on his behalf, of any such timber, mast, spar, saw-log or other description of lumber so marked, shall, in all cases, throw upon the offender the burden of proving that such timber, mast, spar, saw-log or other description of lumber came lawfully into his possession, or into the possession of such others in his employ or on his behalf. R.S.C., c. 174, s. 228.

709. Evidence in cases relating to public stores.—In any prosecution, proceeding or trial under sections three hundred and eighty-five to three hundred and eighty-nine inclusive for offences relating to public stores proof that any soldier, seaman or marine was actually doing duty in Her Majesty's service shall be *primâ facie* evidence that his enlistment, entry or enrolment has been regular.

2 If the person charged with the offence relating to public stores mentioned in article three hundred and eighty-seven was, at the time at which the offence is charged to have been committed, in Her Majesty's service or employment, or a dealer in marine stores, or a

dealer in old metals, knowledge on his part that the stores to which the charge relates bore the marks described in section three hundred and eighty-four shall be presumed until the contrary is shown. 50-51 V., c. 45, s. 13.

710. Evidence in cases of fraudulent marks on merchandise.—In any prosecution, proceeding or trial for any offence under Part XXXIII, relating to fraudulent marks on merchandise, if the offence relates to imported goods evidence of the port of shipment shall be *primâ facie* evidence of the place or country in which the goods were made or produced. 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.

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 Article 64 and comments and authorities, at pp. 40-42, *ante*, as to what constitutes an attempt to commit a crime.

The provision contained in the above Article 711 was derived from sec. 9 of the Imperial statute 14 and 15 Vict., c. 100, by which, after reciting that offenders often escaped conviction by reason that such persons ought to have been charged with attempting to commit offences, and not with the actual commission thereof, it was enacted that, "if on the trial of any person charged with any felony or misdemeanor it shall appear to the jury upon the evidence that the defendant did not complete the offense charged but that he was guilty only of an attempt to commit the same, such person shall not by reason thereof be entitled to be acquitted, but the Jury shall be at liberty to return as their verdict that the defendant is not guilty of the felony or misdemeanor charged in the said indictment; and no person so tried as herein lastly mentioned shall be liable to be afterwards prosecuted for an attempt to commit the felony or misdemeanor for which he was so tried." It was held that upon this clause the defendant could only be convicted of the attempt to commit the very offence with which he was charged, (1) and that the jury could not convict of an attempt which was made a felony by statute, but only of an attempt which was a misdemeanor. (2) Where an indictment charged A. with rape and B. with aiding him, and the Jury found A. guilty of attempt to commit rape and B. of aiding in the attempt, it was contended that this findiug amounted to an acquittal of B., as the case was not within sec. 9 of 14 and 15 Vict,, c. 100, but the objection was overruled, and the conviction of B., for misdemeanor was affirmed. (3)

It was recently held by the court of Queen's Bench (Appeal Side) at Montreal, that a verdict of attempt to assault was not irregular. (4)

712. Attempt charged.—Full offence proved.—When an attempt to commit an offence is charged but the evidence establishes the commis-

(1) R. v. McPherson, Dears & B. 197; 26 L. J. (M. C.) 134.
(2) R. v. Connell. 6 Cox. 178.
(3) R. v. Hapgood, L. R., 1 C.C.R., 221; R. v. Wyatt, 39 L. J. (M. C.) 83, S. C.
(4) Leblanc v. R. (Dec. 1892), 1 Mon. Law. Dig. 433; 16 L. N. 187.

sion 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.

713. Offence charged—Part only proved.—Every count shall be deemed divisible; and if the commission of the offence charged, as described in the enactment creating the offence or as charged in the count, includes the commission of any other offence the person accused may be convicted of any offence so included which is proved, although the whole offence charged is not proved; or he may be convicted of an attempt to commit any offence so included:

2. Provided, that on a count charging murder, if the evidence proves manslaughter but does not prove murder, the Jury, may find the accused not guilty of murder but guilty of manslaughter, but shall not on that count find the accused guilty of any other offence.

This Article follows the common law rule, (now considerably extended by the abolition of the distinction between felonies and misdemeanors), under which it is not necessary to prove, to the full extent laid, the offence charged in the indictment, provided the facts actually proved constitute an offence punishable by law, and for which the defendant may by law be convicted on that indictment. (1) Thus, where an offence at common law was subjected by statute to a higher degree of punishment when committed under certain special circumstances, if, upon an indictment under the statute, the prosecutor proved the commission of the offence but failed to prove the special circumstances required by the statute to augment the punishment, the defendant could be convicted of the common law offence. (2)

Under this rule, if upon an indictment for burglary and stealing goods, there be no burglary but only stealing proved, or if upon an indictment for robbery there be proof of the stealing of the property but not that it was taken from the person by violence or putting in fear, the prisoner may be convicted of the simple theft. (3) Indeed, upon an indictment for burglary and stealing the prisoner may be convicted either of burglary, of entering a dwelling-house in the night with intent to commit an indictable offence therein, of housebreaking, of stealing in a dwelling-house to the amount of $25, (if the property stolen be laid in the indictment to be of that value) or simply of theft, according to the facts proved. (4)

Upon an indictment for assaulting and unlawfully wounding and ill-treating the prosecutor and thereby occasioning him actual bodily harm the defendant may be convicted of a common assault. (5)

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(1) R. v. Hollingberry, 4 B. & C. 330; R. v. Hunt., 2 Camp. 583; R. v. Williams, 2 Camp. 246.

(2) 2 Hale, 191, 192.

(3) 2 Hale, 303.

(4) R. v. Compton, 3 C. & P. 418; R. v. Bullock, 1 Moo. C. C. 423; R. v. Brookes, C & Mar. 543.

(5) R. v. Oliver, Bell, 287; 30 L. J. (M. C.) 12; R. v. Yeadon, L. & C. 81; 31 L. J. (M. C.) 70.

Upon an indictment charging that the defendant did unlawfully make an assault *in and upon* a girl between the ages of ten and twelve and did then unlawfully and carnally know and abuse her, etc., being the ordinary form of an indictment for an offence against sec 51 (now repealed) of 24 and 25 Vict., c. 100, the defendant might have been convicted of a common assault. (1)

The defendant may also be convicted of a common assault upon an indictment charging him with unlawfully wounding and with unlawfully inflicting grievous bodily harm, although the word "*assault*" is not used in the indictment. (2)

It was held on an indictment for publishing a defamatory libel "*knowing the same to be false*," (a misdemeanor punishable under sec. 4, of 6 and 7 Vict., c. 96) that the defendant might be convicted of merely *publishing* a defamatory libel a misdemeanor punishable under sec. 5 of 6 and 7 Vic., c. 96. (3)

It has been held that, upon an indictment for perjury, it is sufficient if any one of the assignments of perjury be proved. (4) And where upon the trial of an indictment for perjury it appeared that the false oath, although taken before a competent authority, was not taken in a judicial proceeding, it was held that the defendant might be convicted of the common law misdemeanor of taking a false oath. (5)

Upon an indictment for conspiring to prevent *workmen* from continuing to work, it is sufficient to prove a conspiracy to prevent *one workman* from working. (6)

Where an indictment contains divisible averments, as, that the defendant "forged and caused to be forged," proof of either averment will be sufficient. (7)

Where two intentions are ascribed to one act,—as that a libel was published with intent to defame A. B., and also to bring the administration of justice into contempt, or, that an assault was committed on a female with intent *to abuse* and *to carnally know* her,—proof of either of the intentions ascribed will be sufficient. (8)

Where an information for libel charged that outrages had been committed *in* and *near* the neighborhood of Nottingham, it was held that the averment was divisible and that it was sufficient to prove that outrages had been committed in either place. (9)

Upon a charge of stealing if any one of the articles enumerated in the indictment be proved to have been stolen by the defendant it will be sufficient. (10)

Upon an indictment for extortion alleging that the defendant extorted twenty shillings it was held sufficient to prove that he extorted one shilling. (11)

On a charge of obtaining money by false pretences proof of part of the pretence alleged was held sufficient where the money was obtained upon that part of the pretence which was proved. (12)

Where several are indicted for burglary and theft, one may be found guilty of the burglary and stealing, and the others of the stealing only. (13)

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(1) R. v. Guthrie, L. R., 1 C. C. R., 241; 39 L. J. (M. C.) 95.
(2) R. v. Taylor, L. R., 1 C. C. R., 194; 38 L. J. (M. C.) 106.
(3) Boaler v. R., 21 Q. B. D., 284; 57 L. J. (M. C.) 85.
(4) R. v. Rhodes, 2 Ld. Raym. 886.
(5) R. v. Hodgkiss, L. R., 1 C. C. R., 212; 39 L. J. (M.C.) 14.
(6) R. v. Bykerdike, 1 M. & R. 179.
(7) R. v. Middlehurst, 1 Burr. 400.
(8) R. v. Evans, 3 Stark, 35; R. v. Dawson, 3 Stark, 62.
(9) R. v. Sutton, 4 M. & Sel 532.
(10) 2 Hale, 302. See R. v. Ellins, R. & R. 188.
(11) R. v. Burdett, 1 Ld. Raym. 149. See R. v. Carson, R. & R. 303.
(12) R. v. Hill, R. & R. 190.
(13) R. v. Butterworth, R. & R. 520.

714. On charge of murder, conviction may be of concealment of birth.—If any person tried for the murder of any child is acquitted thereof the Jury by whose verdict such person is acquitted may find, in case it so appears in evidence, that the child had recently been born, and that such person did, by some secret disposition of such child or of the dead body of such child, endeavour to conceal the birth thereof, and thereupon the court may pass such sentence as if such person had been convicted upon an indictment for the concealment of birth. R.S.C., c. 174, s. 188.

See Articles 239 and 240 and comments and authorities at p. p. 166, 167, *ante*.

715. Trial of joint receivers.—If, upon the trial of two or more persons indicted for jointly receiving any property, it is proved that one or more of such persons separately received any part or parts of such property, the Jury may convict, upon such indictment, such of the said persons as are proved to have received any part or parts of such property. R.S.C., c. 174, s. 200.

716. Proceedings against receivers.—When proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, evidence may be given, at any stage of the proceedings, that there was found in the possession of such person other property stolen within the preceding period of twelve months, and such evidence may be taken into consideration for the purpose of proving that such person knew the property which forms the subject of the proceedings taken against him to be stolen : Provided, that not less than three days' notice in writing has been given to the person accused that proof is intended to be given of such other property, stolen within the preceding period of twelve months, having been found in his possession ; and such notice shall specify the nature or description of such other property, and the person from whom the same was stolen. R.S.C., c. 174, s. 203.

See Article 314 and comments and authorities at pp. 292-296, *ante*.

717. Proceedings against receivers after previous conviction.—When proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, and evidence has been given that the stolen property has been found in his possession, then if such person has, within five years immediately preceding, been convicted of any offence involving fraud or dishonesty, evidence of such previous conviction may be given at any stage of the proceedings, and may be taken into consideration for the purpose of proving that the person accused knew the property which was proved to be in his possession to have been stolen : Provided, that not less than three days' notice in writing has been given to the person accused that proof is intended to be given of such previous conviction ; and it shall not be necessary, for the purposes of this section, to charge in the indictment the previous conviction of the person so accused. R.S.C., c. 174 s. 204.

718. Trial for coinage offences.—Upon the trial of any person accused of any offence respecting the currency or coin, or against the provisions of Part XXXV., no difference in the date or year, or in any legend marked upon the lawful coin described in the indictment, and the date or year or legend marked upon the false coin counterfeited to resemble or pass for such lawful coin, or upon any die, plate, press, tool or instrument used, constructed, devised, adapted or designed for the purpose of counterfeiting or imitating any such lawful coin, shall be considered a just or lawful cause or reason for acquitting any such person of such offence ; and it shall, in any case, be sufficient to prove such general resemblance to the lawful coin as will show an intention that the counterfeit should pass for it. R.S C, c. 174, s. 205.

719. Verdict in Case of libel.—On the trial of any indictment or information for the making or publishing of any defamatory libel, on the plea of not guilty pleaded, the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue upon such indictment or information, and shall not be required or directed, by the court or judge before whom such indictment or information is tried, to find the defendant guilty merely on the proof of publication by such defendant of the paper charged to be a defamatory libel, and of the sense ascribed to the same in such indictment or information ; but the court or judge before whom such trial is had shall, according to the discretion of such court or judge, give the opinion and direction of such court or judge to the jury on the matter in issue as in other criminal cases ; and the jury may, on such issue, find a special verdict if they think fit so to do ; and the defendant, if found guilty, may move in arrest of judgment on such ground and in such manner as he might have done before the passing of this Act. R.S.C., c. 174, s. 152.

720. Impounding documents.—Whenever any instrument which has been forged or fraudulently altered is admitted in evidence the Court or the judge or person who admits the same may, at the request of any person against whom the same is admitted in evidence, direct that the same shall be impounded and be kept in the custody of some officer of the Court or other proper person for such period and subject to such conditions, as to the Court judge or person admitting the same seems meet. R.S.C., c. 174, s. 208.

721. Destroying counterfeit coin. — If any false or counterfeit coin is produced on any trial for an offence against Part XXXV., the Court shall order the same to be cut in pieces in open Court, or in the presence of a justice of the peace, and then delivered to or for the lawful owner thereof, if such owner claims the same. R.S.C., c. 174, s. 209.

722. View.—On the trial of any person for an offence against this Act, the court may, if it appears expedient for the ends of justice, at any time after the Jurors have been sworn to try the case and before they give their verdict, direct that the Jury shall have a

view of any place, thing or person, and shall give directions as to the manner in which, and the persons by whom, the place, thing or person shall be shown to such Jurors, and may for that purpose adjourn the trial and the costs occasioned thereby shall be in the discretion of the court. R.S.C., c. 174, s. 171.

2. When such view is ordered, the court shall give such directions as seem requisite for the purpose of preventing undue communication with such Jurors : Provided that no breach of any such directions shall affect the validity of the proceedings. R.S.C., c. 174, s. 171.

As clause 2 of this Article provides that no breach of any directions given by the Court to prevent undue communications with the Jurors shall affect the validity of the proceedings, it is difficult to say what would be the consequence of any communications being irregularly made with the Jurors in the course of taking a view. In England it is competent for the judge to permit the Jury to view the *locus in quo* at any time during the trial; but it is said to be questionable there whether if any evidence be given irregularly to the Jury at such view that fact is ground for a case for the consideration of the Court for Crown Cases Reserved, or is matter to be placed upon the record and the subject of a writ of error, or merely furnished ground for an application to the Home Secretary for remission of the sentence. (1)

Where upon an indictment for ulawfully displacing a railway switch a prisoner was tried without a Jury by a County Court Judge, exercising jurisdiction under the "Speedy Trials Act," and afer hearing the evidence and the addresses of counsel, the judge reserved his decision, and, then, before giving it, having occasion to pass the place, he examined the switch in question, neither the prisoner nor any one on his behalf being present, and the prisoner was found guilty;—it was held that there was no authority for the judge taking a "*view*" of the place and that even if he had the right to take the view, the manner of his taking it, without the presence of the prisoner or of any one on his behalf, was unwarranted; and, further, that the question whether the judge had the right to take a view was a question of law arising on the trial and was a proper question to reserve under R.S.C., c. 174, sec. 259. (2)

723. Variance and amendment.—If on the trial of any indictment there appears to be a variance between the evidence given and the charge in any count in the indictment, either as found or as amended, or as it would have been if amended in conformity with any particular supplied as provided in sections six hundred and fifteen and six hundred and seventeen, the Court before which the case is tried may, *if of opinion that the accused has not been misled or prejudiced in his defence by such variance*, amend the indictment or any count in it or any such particular so as to make it conformable with the proof.

2. If it appears that the indictment has been preferred under some other Act of Parliament instead of under this Act, or under this instead of under some other Act, or that there is in the indictment, or in any count in it, an omission to state or a defective statement of anything requisite to constitute the offence, or an omission to negative any exception which ought to have been negatived, but that the matter omitted is proved by the evidence, the Court before which

(1) R. V. Martin, L. R., 1 C. C. R., 378; 41 L. J. (M. C.) 113.
(2) R. v. Petrie, 20 Ont. Rep. 317.

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 discretion make the amendment and adjourn the trial to a future day in the same sittings, or discharge the Jury and postpone the trial to the next sittings of the Court, on such terms as it thinks just.

4. In determining whether the accused has been misled or prejudiced in his defence, the Court which has to determine the question shall consider the contents of the depositions, as well as the other circumstances of the case.

5. Provided that the propriety of making or refusing to make any such amendment shall be deemed a question for the Court, and that the decision of the Court upon it may be reserved for the Court of Appeal, or may be brought before the Court of Appeal like any other decision on a point of law. R.S.C., c. 174, ss. 237, 238, 239.

The first paragraph of this Article is based upon sec. 1, of the Imperial statute 14 and 15 Vict., c. 100, giving power to amend variances between the statement, as contained in the indictment, of matters of description, etc., and the evidence offered in proof of such matters; but the Imperial statute not only makes the right to amend dependent upon the variance being such as cannot in the opinion of the Court, prejudice the defendant in his defence, but also dependent upon its being such as the Court considers is *not material to the merits of the case*. The power of amendment given by the first paragraph of the above Article seems, therefore, to be broader than that given by the English statute; and clause 2 of the above Article goes still further by enacting that the Court may amend omissions or defective statements of anything requisite to constitute the offence, etc., provided the matter omitted be proved by the evidence; and clause 3 provides that, even, if the defendant has in the opinion of the Court, been misled or prejudiced in his defence, by any such variance, error, omission, or defective statement, the Court may make the amendment, and adjourn or postpone the trial.

It seems that the amendment may be made after the prisoner's counsel has addressed the jury; (1) but that it must be made before the verdict is rendered. (2)

It was held, under the English statute, that where an amendment had once been made there was no power of amending the amendment or of reverting to the indictment as it originally stood and that the case must have been decided upon the indictment in its amended form. (3) But it will be seen that, under the first paragraph of the above Article 723, either the indictment as found or as amended, or any particular supplied under Articles 615 and 617, may now be amended so as to make a variance conformable with the proof.

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(1) R. v. Fullarton, 6 Cox.

(2) R. v. Frost, Dears. 474; 24 L. J. (M. C.) 116; R. v. Larkin, Dears. 365; 23 L. J. (M. C.) 125.

(3) R. v. Barnes, L. R., 1 C. C. R., 45; 35 L. J. (M. C.) 204; R. v. Pritchard, L. & C. 34; 30 L. J. (M. C.) 169 R. v. Webster, L. & C., 77.

It has been held under the Imperial statute that an indictment might be amended by striking out an erroneous and unnecessary statement of the time of the passing of an Act of parliament referred to in it; (1) that an indictment for the obstruction of a footway might be amended so as to correct a misdescription of one of the termini of the footway; (2) that in an indictment for night poaching an amendement might be made so as to correct a misdescription of the occupation of the field; (3) that an amendment might also be made where the ownership of stolen property was wrongly described; (4) or in order to correct a wrong description of the stolen property itself, as where the statement in the indictment was that the prisoner stole nineteen shillings and sixpence, whereas the proof shewed that she stole a sovereign. (5) And where an indictment for perjury alleged that the perjury was committed on a trial for burning a *barn* whereas the proof was that the trial was for firing a *stack*, the indictment was allowed to be amended. (6) So, also, where an indictment charged the prisoner with intent to kill and murder A. W., an infant, and the prosecution failed to prove that the child had ever borne such a name the indictment was allowed to be amended by striking out the name, and describing the child as "a certain female child whose name is to the Jurors unknown. (7)

Where in an indictment for perjury before justices, the justices were described as being justices for the county and the evidence shewed that they were borough justices only, this was held a proper subject for amendment. (8)

See comments under Article 629 at pp 591 and 592, *ante*.

See Articles 733 and 734 *post*, as to motions in arrest of judgment.

As to reserving questions of law see Article 743, *post*.

724. Amendment to be endorsed on record.—In case an order for amendment as provided for in the next preceding section is made it shall be endorsed on the record; and all other rolls and proceedings connected therewith shall be amended accordingly by the proper officer and filed with the indictment, among the proper records of the court. R.S.C., c. 174, s. 240.

725. Form of formal record in case of an amendment. — If it becomes necessary to draw up a formal record in any case in which an amendment has been made as aforesaid, such record shall be drawn up in the form in which the indictment remained after the amendment was made, without taking any notice of the fact of such amendment having been made. R.S.C., c. 174, s. 243.

726. Form of record of conviction or acquittal. — In making up the record of any conviction or acquittal 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

(1) R. v. Westley, Bell, 193; 29 L. J. (M. C.) 35.
(2) R. v. Sturge, 3 E. & B. 374; 23 L. J. (M. C.) 172.
(3) R. v. Sutton, 13 Cox, 648.
(4) R. v. Vincent, 2 Den. 464; 21 L. J. (M. C.) 109: R. v. Marks, 10 Cox, 367.
(5) R. v. Gumble, L. R., 2 C.C.R., 1; 42 L. J. (M. C.) 68.
(6) R. v. Neville, 6 Cox, 69.
(7) R. v. Welton, 9 Cox, 297.
(8) R. v. Western, L. R., 1 C.C.R., 122; 37 L. J. (M. C.) 81.

from time to time, prescribed by any rule or rules of the superior courts of criminal jurisdiction respectively,—which rules shall also apply to such inferior courts of criminal jurisdiction as are therein designated. R.S.C., c. 174, s. 244.

See comments at p. 668, *post*, as to form of Crown Book suggested by the Royal Commissioners

727. Jury retiring to consider verdict.—If the Jury retire to consider their verdict they shall be kept under the charge of an officer of the court in some private place, and no person other than the officer of the court who has charge of them shall be permitted to speak or to communicate in any way with any of the Jury without the leave of the court.

2. Disobedience to the directions of this section shall not affect the validity of the proceedings : Provided that if such disobedience is discovered before the verdict of the Jury is returned, the Court, 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.

728. Jury unable to agree may be discharged.—If the Court is satisfied that the Jury are unable to agree upon their verdict, and that further detention would be useless, it may in its discretion discharge them and direct a new Jury to be empanelled during the 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.

In former times the Jury on retiring to consider their verdict were placed in charge of an officer sworn to keep them "without meat, drink, or fire, candle-light only excepted, and to suffer none to speak to them nor to speak to them, himself, without leave of the court, except only to ask them whether they were agreed : " (1) and, if, before giving their verdict the Jury were to eat or drink, they were subject to be fined. (2) The law on the subject was changed by the Imperial statute 33 and 34 Vict., c. 77, sec 23, so as to allow to a Jury the use of a fire when out of Court and to be supplied at the discretion of the Court with refreshments. By sec. 21 of 53 Vic., c. 37, (Dom) it was provided that Jurors *might* in the discretion of the Court be allowed the use of fire and be also allowed reasonable refreshment ; and Article 674, *ante*, now provides that Jurors after being sworn *shall* be allowed, at any time before verdict, the use of fire and light, when out of Court, and that they *shall* also be allowed reasonable refreshment.

It used to be said that in the case of a trial at the Assizes, the Jury, if they did not agree before the Judges departed the county, might be carried with them to the borders of the county, or, according to some authorities, from place to place through the circuit until they were unanimous. (3) If this was ever the law, it has long since ceased to be so. (4) It was said also to be at one time a general rule of law, that a Jury sworn and charged in case of life or member could not be discharged by the Court or any other, but that they ought to give

(1) 2 Hale, 296.
(2) 1 Inst., 227.
(3) 2 Hale, 297 ; Bac. Abr., Juries G.) ; 1 Vent. 97.
(4) Winsor v. R , L. R., 1 Q. B. 326 ; 35 L. J. (M. C.) 121.

their verdict." (1) This doctrine, however, which if taken, literally, seemed to command the confinement of the Jury till death, if they did not agree, seems to have been too broadly stated by Lord Coke, and it was denied to be law in Ferrar's Case, (2) and it appears to have been long considered as established law that, as expressly declared by the above Article, 728, that a Jury sworn and charged in any case may be discharged, if the Court is satisfied that they are unable to agree upon their verdict. (3)

The Judge alone is to decide upon the existence of the necessity of discharging the Jury without agreeing upon their verdict. Thus were the Jury on a trial at the Assizes, for murder were locked up from the middle of the day until the following morning, and then, on their being sent for into court, stated that it was impossible for them to agree, whereupon the judge discharged them, it was held that he was warranted by law in doing so. (4)

Where a material and necessary witness for the prosecution refused to answer a question put to him, and although informed by the Judge that he was bound to do so, persisted in such refusal, and was thereupon adjudged guilty of contempt of court and fined and imprisoned, the Judge, on the application of the Counsel for the prosecution, and against the will of the defendant, discharged the Jury. The course pursued by Mr. Justice Hill in this case was afterwards questioned in the Court of Queen's Bench, and although it did not become necessary to give judgment upon its propriety, Blackburn, J., expressed an opinion that it was right, which opinion seems to have been shared by Cockburn, C. J. (5)

The exercise of the Judge's discretion in discharging a Jury unable to agree upon their verdict is now expressly declared by clause 2 Article 728, to be not subject to review by any Court.

729. Proceedings on Sunday.—The taking of the verdict of the Jury or other proceeding of the court shall not be invalid by reason of its happening on Sunday.

See Remarks of the English Commissioners, upon this provision, at p. p. 619 and 620, and the case of Winsor v. R., there cited.

730. Suspension of sentence of death on pregnant woman.—If sentence of death is passed upon any woman she may move in arrest of execution on the ground that she is pregnant. If such a motion is made the Court shall direct one or more registered medical practitioners to be sworn to examine the woman in some private place, either together or successively, and to inquire whether she is with child of a quick child or not. If upon the report of any of them it appears to the Court that she is so with child execution shall be arrested till she is delivered of a child, or until it is no longer possible in the course of nature that she should be so delivered.

731. Jury de ventre inspiciendo abolished.—After the commencement of this Act, no Jury *de ventre inspiciendo* shall be empanelled or sworn.

The oaths heretofore in use and taken by the fore matron and matrons of a

(1) Co Litt. 227 (*b*). See, also, 3 Inst. 110; Fost. 29–39.
(2) Ferrar's Case, Sir T. Raym. 84.
(3) Winsor v. R., L.R. 1 Q. B., 289; R. v. Shields, 28 St. Tr. 414; R. v. Cobbett, 3 Burn's J., (30 Ed.), 98.
(4) R. v. Newton, 13 Q. B., 716; 18 L. J. (M. C.) 201.
(5) R. v. Charlesworth, 2 F. & F. 326; 1 B. & S. 460; 31 L. J. (M. C.) 25.

Jury of matrons may be altered and administered, to medical practitioners appointed under Article 730, in the following form :—

"You and each of you swear that you will examine and search the prisoner at the bar and enquire and ascertain whether she be with child of a quick child and a true report thereof make according to your skill and understanding.—So help you God."

See comments at p. 192, *ante*, as to the different stages of pregnancy.

732. Stay of proceedings.—The Attorney-General may, at any time after an indictment has been found against any person for any offence, and before judgment is given thereon, direct the officer of the court to make on the record an entry that the proceedings are stayed by his direction, and on such entry being made all such proceedings shall be stayed accordingly.

2. The Attorney-General may delegate such power in any particular court to any counsel nominated by him.

This power of the Attorney General to stay proceedings was formerly exercised by entering a *nolle prosequi*. As to the occasions on which it has been usual to enter a *nolle prosequi*, see Archbold's Cr. Pl. and Ev. 21 Ed. p p. 119-121.

733. Motion in arrest of judgment.—If the jury find the accused guilty, or if the accused pleads guilty, the judge presiding at the trial shall ask him whether he has anything to say why sentence should not be passed upon him according to law : but the omission so to ask shall have no effect on the validity of the proceedings.

2. The accused may at any time before sentence move in arrest of judgment on the ground that the indictment does not (after any amendment which the Court is willing to and has power to make) state any indictable offence.

3. The Court may in its discretion either hear and determine the matter during the same sittings or reserve the matter for the Court of Appeal as herein provided. If the Court decides in favour of the accused, he shall be discharged from that indictment. If no such motion is made, or if the court decides against the accused upon such motion, the Court may sentence the accused during the sittings of the Court, or the Court may in its discretion discharge him on his own recognizance, or on that of such sureties as the court thinks fit, or both, to appear and receive judgment at some future Court or when called upon. If sentence is not passed during the sitting, the judge of any superior court before which the person so convicted afterwards appears or is brought, or if he was convicted before a court of general or quarter sessions, the court of general or quarter sessions at a subsequent sitting may pass sentence upon him or direct him to be discharged.

4. When any sentence is passed upon any person after a trial had under an order for changing the place of trial, the Court may in its discretion, either direct the sentence to be carried out at the place where the trial was had or order the person sentenced to be removed

to the place where his trial would have been had but for such order, so that the sentence may be there carried out.

See comments under Article 629 at p. p. 591, 592, *ante*, and see Article 723, and comments at p. 654, *ante*. See also Article 745, *post*, as to reserving questions of law.

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 Article 629 and comments at pp. 591, 592, *ante*, also Article 723, *ante*.

735. Verdict not to be impeached for certain Omissions as to Jurors. (*As Amended by* 51 *Vic., c.* 32.)—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.

736. Insanity of accused at time of offence.—Whenever it is given in evidence upon the trial of any person charged with any indictable offence, that such person was insane at the time of the commission of such offence, and such person is acquitted, the jury shall be required to find, specially, whether such person was insane at the time of the commission of such offence, and to declare whether he is acquitted by it on account of such insanity ; and if it finds that such person was insane at the time of committing such offence, the Court before which such trial is had, shall order such person to be kept in strict custody in such place and in such manner as to the Court seems fit, until the pleasure of the Lieutenant-Governor is known.

See Article 11, and comments, at pp. 9-12, on Insanity. See also comments under Article 657, p. 617, *ante*.

737. Insanity of accused on arraignment or trial. — If at any time after the indictment is found, and before the verdict is given, it appears to the Court that there is sufficient reason to doubt whether the accused is then, on account of insanity, capable of conducting his defence, the Court may direct that an issue shall be tried whether the accused is or is not then on account of insanity unfit to take his trial.

2. If such issue is directed before the accused is given in charge to a Jury for trial on the indictment, such issue shall be tried by any twelve Jurors. If such issue is directed after the accused has been given in charge to a Jury for trial on the indictment, such Jury shall be sworn to try this issue in addition to that on which they are already sworn.

3. If the verdict on this issue is that the accused is not then unfit to take his trial the arraignment or the trial shall proceed as if no such issue had been directed. If the verdict is that he is unfit on account of insanity the Court shall order the accused to be kept in custody till the pleasure of the Lieutenant-Governor of the province shall be known, and any plea pleaded shall be set aside and the Jury shall be discharged.

4. No such proceeding shall prevent the accused being afterwards tried on such indictment. R.S.C., c. 174, ss. 252 and 255.

As insanity is matter of defence, a Grand Jury have no authority by law to ignore a bill upon the ground that the prisoner is insane. It is their duty to find the bill, and then the Court, either on arraignment or trial, may order the prisoner's detention during the Queen's pleasure. (1)

The form of oath to be administered to the Jury to try whether a prisoner refusing to plead be insane or not is as follows:—

"You shall diligently enquire and true presentment make for and on behalf of our Sovereign Lady the Queen whether A. B., the defendant whe stands here indicted for an indictable offence be insane or not, and a true verdict give according to the best of your understanding —So help you God."

In the case of R. v. Goode, where the prisoner was tried for using seditious language against the Queen, in her presence, it was held that the Jury might form their own opinion of the state of the prisoner's mind when arraigned, from his demeanor during the inquest, without any evidence being given on the subject; but under ordinary circumstances it is usual for the Judges to require some evidence as to the prisoner's then state of mind. (2)

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

(1) R. v. Hodges, 8 C. & P. 195.
(2) R. v. Goode, 7 A. & E. 536.

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.

FORMS UNDER PART LI.

FROM SCHEDULE ONE.

KK.—(*Section* 666.)

CHALLENGE TO ARRAY.

Canada,
Province of
County of

The Queen *v* C. D. } The said A. B., who prosecutes for our Lady the Queen (*or* the said C. D., *as the case may be*) challenges the array of the panel on the ground that it was returned by X. Y., sheriff of the county of (*or* E. F., deputy of X. Y., sheriff of the county of , *as the case may be*), and that the said X. Y. (*or* E. F, *as the case may be*) was guilty of partiality (*or* fraud, *or* wilful misconduct) (1) on returning said panel.

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(1) Particulars should be given shewing in what respect the Sheriff or Deputy Sheriff was partial or in what his alleged fraud or wilful misconduct consists.

LL.—(*Section* 668.)

CHALLENGE TO POLL.

Canada,
Province of .
County of .

The Queen
v
C. D.

The said A. B., who prosecutes, etc. (*or* the said C. D., *as the case may be*) challenges G. H., on the ground that his name does not appear in the panel, (*or* "that he is not indifferent between the Queen and the said C. D.," (1) *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."

PART LII.

APPEAL.

On this subject the English Commissioners made the following report:

"The procedure, under the existing law, subsequent to a trial, and in the nature of an appeal, may be arranged under three separate heads. These are, *first*, proceedings in error; *secondly*, cases for the Court of Crown Cases reserved; *thirdly*, motions for a new trial."

Error.—"PROCEEDINGS IN ERROR are proceedings by which the Queen's Bench Division of the High Court is called upon to reverse a judgment on the ground that error appears on the record,—a writ of error being granted only on the Attorney General's fiat. An appeal lies ultimately to the House of Lords. The record, however, is so drawn up that many matters by which a prisoner might be prejudiced,—indeed, the matters by which he is most likely to be prejudiced, would not appear upon it; for instance, the improper reception or rejection of evidence, or a misdirection by the judge would not appear upon the record. This remedy, therefore, applies only to questions of law, and only to that very small number of legal questions which concern the regularity of the proceedings themselves, *e. g.*, an alleged irregularity in empanelling the Jury, (Mansel v. R.), (2) or in discharging a Jury (Winsor v. R.), (3) or a defect appearing upon the face of the indictment (Bradlaugh v. R.) (4). The result is that the remedy by writ of error is confined to a

(1) Particulars should be given here shewing in what respect the Juror is un-indifferent.
(2) Mansell v. R., 8 E. & B. 54; Dears. & B. 375; 27 L. J. (M. C.) 4.
(3) Winsor v R, L. R., 1 Q. B. 377; 35 L. J. (M. C.) 121.
(4) Bradlaugh v. R., 3 Q. B. D. 607.

very small number of cases of rare occurrence. It must be added that the procedure in writs of error is extremely technical. It is necessary in such cases to draw up the record, and this is an extremely formal and prolix document, though the materials from which it is compiled are simply short notes in a rough minute book kept by the officer of the Court. When the record is drawn up the Court of Appeal cannot look beyond it, but is tied down to the matters expressly entered in it. The proceedings on special verdicts and demurrers to evidence have practically fallen into disuse.

Reserved Case.—" The second mode in which proceedings in the nature of an appeal may be taken, is upon a CASE STATED by the judge for the Court for CROWN CASES RESERVED. Up to the year 1848 it was the practice if any question of law which would not appear on the record arose at a criminal trial at the Assizes, for the judge who tried the case to state the point for the opinion of all the judges, by whom it was afterwards considered and determined, no reasons for the determination being given. If the judges thought that the conviction was wrong, the person convicted was pardoned. There was no mode of reserving cases which arose at the Quarter Sessions. By 11 and 12 Vict., c. 78, a Court for Crown Cases Reserved was instituted, composed of the judges of the three common law Courts or any five of them, a Chief Justice or the Lord Chief Baron being one. Upon the construction of the Act it has been considered that if a differance of opinion occurs between the five judges, the minority are not bound by the majority, but the matter must be referred to the whole body, —a course which is on many obvious grounds inconvenient. The existing power of appeal on a point reserved, is only on behalf of the accused. The consequence is that the judge cannot reserve a question unless he rules it against the accused, notwithstanding his own opinion may be that though the point is doubtful it should be decided in favor of the accused; and if ultimately it is determined that there has been an improper ruling against the accused, on some point of perhaps very little importance, or that some evidence, perhaps of little weight, has been improperly received or rejected, the Court of Appeal must avoid the conviction and has no power to grant a new trial The procedure is, however, extremely simple and free from technicality. No record is drawn up, and the Judge who reserves the point states a case in simple language.

New Trial.—" The third proceeding in the nature of an appeal is a Motion for a NEW TRIAL. This is confined to cases which have either originated in or have been removed into the Queen's Bench Division, and as it seems (R. v. Bertrand, (1), disapproving of R. v. Scaiffe), (2), to cases of misdemeanour. A defendant who has been convicted may move for a new trial in these cases as in a civil case, but the decision of the Queen's Bench Division is final.

" It seems to us that in order to form a complete system these various forms of proceeding ought to be combined For this purpose

(1) R. v. Bertrand, L. R., 1 Priv. Coun. 520.
(2) R. v. Scaiffe, 2 Den. 281; 20 L. J. (M. C.) 229; 17 Q. B. 238.

we propose in the first place to constitute a single Court of Criminal Appeal closely resembling the Court for Crown Cases Reserved, but with two important differences. We propose that, as in other courts, the minority should be bound by the majority. A Court composed of fifteen judges is inconveniently large. If on a point of importance a Court of five should be divided it might be desirable that a further appeal should be possible. We accordingly propose that the Court should have power to permit an appeal to the House of Lords.

"We do not interfere with the present practice as to trials in the Queen's Bench Division, and we propose that in the case of such trials, the Queen's Bench Division should be the Court of Appeal, and that it should have power to give leave to appeal to the House of Lords. (1)

"As to the power to appeal and the cases in which an appeal should lie the draft code proposes to make considerable changes in the existing law as regards both matter of law and matter of fact. With regard to matter of law, the Judge has at present absolute discretion as to reserving or not reserving questions which arise at the trial and do not appear on the record. This we think ought to be modified. We propose accordingly that the Judge shall be bound to take a note of such questions as he may be asked to reserve, unless he considers the application frivolous. If he refuses to grant a case for the Court of Appeal the Attorney General may in his discretion grant leave to the person making the application to move the Court of Appeal for leave to appeal, and the Court may direct a case to be stated. The Court on hearing the case argued may either confirm the ruling appealed from, or grant a new trial, or direct the accused to be discharged; in a word, it may act in all respects as in a civil action when the question is one of law, and that *on the application of either side.* This in some ways is favorable and in others unfavorable to accused persons. By the existing law the prisoner's right to appeal on a point of law is, generally speaking, subject to the absolute discretion of the Judge; but if he is permitted to appeal and if the Court above decides in his favor, the conviction is quashed, although in a civil case he would gain nothing but a right to a new trial. Under section 540, (2) the prisoner would be able to appeal with the leave of the Attorney General, against the will of the Judge, but if he succeeded he would in many cases only obtain a new trial. If the matter appealed upon was a mere irregularity, immaterial to the merits of the case, the Court of Appeal would have power to set it right. All this would diminish the value of the right of appeal to prisoners, though it would increase its extent. It must be observed too that the right of appeal on questions of law is given, equally to both sides. The Commissioners as a body express no opinion on the

(1) In Canada, the further appeal from the Provincial Appeal Court is to the Supreme Court of Canada, but it is only allowed in case of any Judge of the Provincial Court of Appeal dissenting from the opinion of the majority. (See Articles 742, and 750 *post.*)

(2) Article 744, *post*, is to the same effect as section 540 of the English Draft Code.

expediency of this. If it is thought proper to confine the right to the accused, the alteration of a few words in the section would effect that object.

"In dealing with appeals upon matter of law little is wanted beyond an adaptation of the existing law.

"It is more difficult to provide in a satisfactory way for an appeal upon matters of fact. It is obvious that the only practicable means of giving such an appeal is by permitting convicted persons to move, under certain circumstances, for a new trial, either on the ground that the verdict was against the evidence, or on the ground that the verdict has been shown to be wrong by facts discovered subsequently to the trial. If the ground on which a new trial is sought for is that that the verdict was against the evidence, the case is comparatively simple. In such cases the judge before whom the case was tried ought to have power to give leave to the convicted person to apply to the Court of Appeal for a new trial. If the convict had an absolute right to make such an application, it would be made whenever the convict could afford it. By making the leave of the judge who tried the case a condition for such an application, such motions would be practically confined to cases in which the Judge thought the Jury had been harsh towards the prisoner. However, when the application was made, the Court of Appeal could deal with it as in civil cases.

"A much more difficult question arises in relation to cases which occur from time to time, where circumstances throwing doubt on the propriety of a conviction are discovered after the conviction has taken place. In these cases it was provided by the Bill that the Secretary of State should have power to give leave to the person convicted to apply to the Court of Appeal for a new trial. Upon the fullest consideration of the subject we do not think that such an enactment would be satisfactory. In such a case, the Court of Appeal must either hear the new evidence itself, or have it brought before it upon affidavit. In the former case the Court would substantially try the case upon a motion for a new trial, and this is opposed to the principle of trial by Jury. In the latter case, they would have no materials for a satisfactory decision.

"It is impossible to form an opinion on the value of evidence given on affidavit and *ex parte* until it has been checked and sifted by independent inquiry. Such duties could not be undertaken by a Court of Appeal. If the Secretary of State gave leave to a convict to move the Court of Appeal for a new trial on evidence brought before the court by affidavit, the only well-ascertained fact before the court would be that the Secretary of State considered that there were grounds for such an application This would make it difficult to refuse the application. The Secretary of State would be responsible only for granting leave to move the court for a new trial. The court in granting a new trial would always in fact take into account the opinion indicated by the Secretary of State's conduct. It must also be remembered that a court of justice in deciding upon such applications

would, in order to avoid great abuses, be obliged to bind itself by strict rules, similar to those which are enforced in applications for new trials in civil cases on the ground of newly discovered evidence Such applications cannot be made at all after the lapse of a very short interval of time and are not granted if the applicant has been guilty of any negligence ; and this stringency is essential to the due administration of justice and to the termination of controversies. It would be unsatisfactory to apply such rules to applications for new trials in criminal cases. No matter at what distance of time the innocence of a convicted person appeared probable,—no matter how grossly a man (suppose under sentence of death) had mismanaged his case, it would be impossible to refuse him a fresh investigation on the ground of such lapse of time or mismanagement. Cases in which, under some peculiar state of facts, a miscarriage of justice takes place, may sometimes though rarely occur ; but when they occur it is under circumstances for which fixed rules of procedure cannot provide.

"Experience has shown that the Secretary of State is a better judge of the existence of such circumstances than a Court of Justice can be. He has every facility for enquiring into the special circumstances; he can and does if necessary avail himself of the assistance of the judge who tried the case and of the law officers. The position which he occupies is a guarantee of his own fitness to form an opinion. He is fettered by no rule, and his decision does not form a precedent for subsequent cases. We do not see how a better means could be provided for enquiry into the circumstances of the exceptional cases in question. The powers of the Secretary of State. however, as to disposing of the cases which come before him are not as satisfactory as his power of enquiring into their circumstances. He can advise Her Majesty to remit or commute a sentence: but, to say nothing of the inconsistency of pardoning a man for an offence on the ground that he did not commit it, such a course may be unsatisfactory.

"The result of the enquiries of the Secretary of State may be to show not that the convict is clearly innocent, but that the propriety of the conviction is doubtful ; that matters were left out of account which ought to have been considered ; or that too little importance was attached to a view of the case, the bearing of which was not sufficiently apprehended at the trial; in short, the enquiry may show that the case is one on which the opinion of a second Jury ought to be taken. If this is the view of the Secretary of State, he ought, we think to have the right of directing a new trial on his own undivided responsibility. Such a power we accordingly propose to give him by section 545. (1)

"With respect to the materials to be laid before the Court of Appeal, we propose to abolish the present record. It is extremely

(1) A similar provision to section 545 of the English Draft Code is contained in Article 748, *post*, with this difference that our Article contains the words "Minister of Justice" instead of the words "Secretary of State" contained in the English section.

technical and give little real information. Instead of it we propose that a book to be called the Crown Book should be kept by the officer, which should record in common language the proceedings of the Court. In practice the record is hardly ever made up, and if it is necessary to make it up, the officer's minute book affords the only materials for doing so. Our proposal is practically to substitute the original book for the record which is made up from it, and is merely a technical expansion of the original.

"We also propose that the Court of Appeal should have power to call for the judge's notes, and to supply them if they are considered defective by any other evidence which may be available,—a short-hand writer's notes for instance. (1)

"We consider the statutory recognition of the duty of the Judge to take notes as a matter of some importance." Eng. Commrs'. Rep.

Crown Book.—The provision by which the Royal Commissioners proposed to substitute the Crown Book for the present formal record is contained in section 511 of the English Draft Code, and is as follows :—

"It shall not in any case be necessary to draw up any formal record of the proceedings on a trial for a criminal offence, but the proper officer of the Court before which the trial takes place shall cause to be preserved all indictments and all depositions transmitted to him, and he shall keep a book to be called the Crown Book, which book shall be the property of the Court, and shall be deemed a record thereof, and the contents thereof proveable by a certified copy or extract without production of the original.

"In the Crown Book shall be entered the names of the Judge, Recorder, Justices or other members of the Court, and of the Grand Jurors, and a memorandum of the substance of all proceedings at every trial, and of the result of every trial ; and such entries, or a certified copy thereof, or of so much thereof as may be material, may be referred to on any proceeding by way of appeal as herein provided ; and any certificate of any indictment, trial, conviction, or acquittal, or of the substance thereof, shall be made up from the memorandum in such book, and shall be receivable in evidence for the same purpose and to the same extent as certificates of records or the substantial parts thereof are now receivable.

"Any erroneous or defective entry in the Crown Book may at any time be amended, in accordance with the fact, by the Judge or Justice who presided at the trial.

"Provided always that nothing herein contained shall dispense with the taking of notes by the Judge or Justice who presided at the trial.

"If the trial takes place before a different Court from that to which the Accused was committed for trial or at a different Court from that before which the indictment was found, a statement shall be made in the Crown Book of the order under which the trial is so held, and by whom and where it was made.

(1) For a provision to this effect see article 745, *post*.

"The officer of the Court shall cause to be entered in the Crown Book a statement of the following particulars :

(*a.*) The name of the committing Justice and the charge on which the Accused was committed ; or

(*b.*) If the accused was not committed and the prosecutor was bound over to prosecute under the provisions of section 458 of this Act, (1) the name of such prosecutor, and by whom he was bound over ; or

(*c.*) If the indictment is preferred by consent, then the name of the Court or person giving such consent ;

(*d.*) The names of all the witnesses whose depositions have been transmitted to the officer of the Court, and of the Justices before whom and of the places where their depositions were taken ;

"Provided that the absence of such a statement or any mistake in it shall not be an objection to the proceedings ; but the Court to which the Crown Book belongs may and shall on the application of either the prosecutor or accused at any time, order a statement of these particulars to be entered, or amend the statement where erroneous or defective."

This provision has not been incorporated in our Code ; but it is provided by Article 726, *ante*, that the manner of making up the record shall be subject to any such alterations in the present mode as may, from time to time, be prescribed by any rules of the Superior Courts of Criminal Jurisdiction ; and it may, by some of the Courts, be found advisable to adopt the Crown Book above suggested by the Royal Commissioners.

742. Appeal in criminal cases.—An appeal from the verdict or judgment of any court or judge having jurisdiction in criminal cases or of a Magistrate proceeding under section seven hundred and eighty-five, (2) 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.

See Articles 750, and 900, *post*.

743. Writs of error abolished.—Reserving questions of law.—No proceeding in error shall be taken in any criminal case BEGUN AFTER THE COMMENCEMENT OF THIS ACT :

2. The Court before which any accused person is tried may, either during or after the trial, reserve *any question of law* arising either *on* the trial or on any of the proceedings *preliminary*, *subsequent*,

(1) See Art. 595, *post*.
(2) Art. 785, relates to summary trials, *in Ontario*, of offences triable in a Court of General Sessions.

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.

In an English case, where a prisoner had pleaded guilty, the Judge,—having, after leaving the Assize town, had his attention called to an unreported case which, if it was law, showed that the indictment to which the plea of guilty had been so pleaded was bad,—thereupon stated a case for the opinion of the Court for Crown Cases Reserved; and it was held, that, although the prisoner had pleaded guilty, the question of whether the indictment was bad was a question arising on the trial, so as to give the Court of Crown Cases Reserved jurisdiction to decide it. (1)

It will be noticed that the above Article, 743, gives the Court power to reserve for the opinion of the Court of Appeal, questions of law arising either *on the trial* or on any of the proceedings *preliminary, subsequent*, or *incidental* thereto, or arising out of the direction of the Judge.

744. Appeal when no question is reserved.—If the Court refuses to reserve the question, the PARTY APPLYING may, with the leave in writing of the Attorney-General, move the Court of Appeal as hereinafter provided. The Attorney-General may in his discretion give or refuse such leave.

2. The Attorney-General, or any person to whom such leave as aforesaid is given, 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 require, 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.

(1) R. v. Brown, 24 Q. B. D., 357; 59 L. J. (M. C.), 47.

It will be seen from the wording of these two Articles 743 and 744, and of Article 746, *post*, that on points of law, an equal appeal is given to the Crown and to the accused. But in regard to questions of fact, it will be seen, by Article 747, as well as by clauses (*d*) and (*e*) of Article 646, *post*, that the right to move for a new trial is not given to the Crown, but only to a convicted defendant.

745. Evidence for Court of Appeal.—On any appeal or application for a new trial, the court before which the trial was had shall, if it thinks necessary, or if the Court of Appeal so desires, send to the Court of Appeal a copy of the whole or of such part as may be material of the evidence or the notes taken by the judge or presiding justice at the trial. The Court of Appeal may, if only the judge's notes are sent and it considers such notes defective, refer to such other evidence of what took place at the trial as it may think fit. The Court of Appeal may in its discretion send back any case to the Court by which it was stated to be amended or re-stated. R.S.C., c. 174, s. 264.

746. Powers of Court of Appeal.—Upon the hearing of any appeal under the powers hereinbefore contained, the Court of Appeal may—

(*a.*) confirm the ruling appealed from; or

(*b.*) if of opinion that the ruling was erroneous, and that there has been a mis-trial in consequence, direct a new trial; or

(*c.*) if it considers the sentence erroneous or the arrest of judgment erroneous, pass such a sentence as ought to have been passed or set aside any sentence passed by the court below, and remit the case to the court below with a direction to pass the proper sentence; or

(*d*) if of opinion in a case in which the accused has been convicted that the ruling was erroneous, and that the accused ought to have been acquitted, direct that the accused shall be discharged, which order shall have all the effects of an acquittal; or

(*e.*) direct a new trial; or

(*f.*) make such other order as justice requires: Provided that no conviction shall be set aside nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial or some misdirection given, unless in the opinion of the Court of Appeal some substantial wrong or miscarriage was thereby occasioned on the trial: Provided that if the Court of Appeal is of opinion that any challenge for the defence was improperly disallowed, a new trial shall be granted.

2. If it appears to the Court of Appeal that such wrong or miscarriage affected some count only of the indictment, the Court may give separate directions as to each count and may pass sentence on any count unaffected by such wrong or miscarriage which stands good, or may remit the case to the court below with directions to pass such sentence as justice may require.

3. The order or direction of the Court of Appeal shall be certified under the hand of the presiding Chief Justice or senior puisne judge

to the proper officer of the court before which the case was tried, and such order or direction shall be carried into effect. R.S.C., c. 174, s. 263.

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.

748. New Trial by order of the Minister of Justice.—If upon any application for the mercy of the Crown, on behalf of any person *convicted* of an indictable offence, the Minister of Justice entertains a doubt whether such person ought to have been convicted, he may, instead of advising Her Majesty to remit or commute the sentence, after such inquiry as he thinks proper, by an order in writing direct a new trial at such time and before such Court as he may think proper.

See Remarks of Royal Commissioners on this subject set out at pp. 666, and 667, *ante*.

It will be seen, by the terms of Articles 746, 747 and 748, that no new trial can be granted in favor of the Crown, but only in favor of a convicted defendant.

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.

750. Appeal to Supreme Court of Canada.—Any person convicted of any indictable offence, whose conviction has been affirmed on an appeal taken under section seven hundred and forty-two may appeal to the Supreme Court of Canada against the affirmance of such conviction; and the Supreme Court of Canada shall make such rule or order thereon, either, in affirmance of the conviction or for granting a new trial, or otherwise, or for granting or refusing such application, as the justice of the case requires, and shall make all other necessary rules and orders for carrying such rule or order into effect:

Provided that no such appeal can be taken if the Court of Appeal is unanimous in affirming the conviction, nor unless notice of appeal in writing has been served on the Attorney-General within fifteen days after such affirmance or such further time as may be allowed by the Supreme Court of Canada or a judge thereof.

2. Unless such appeal is brought on for hearing by the appellant at the session of the Supreme Court during which such affirmance takes place, or the session next thereafter if the said court is not then in session, the appeal shall be held to have been abandoned, unless otherwise ordered by the Supreme Court or a Judge thereof.

3. The judgment of the Supreme Court shall, in all cases, be final and conclusive. 50-51 V., c. 50, s. 1.

751. Appeals to Privy Council Abolished.—Notwithstanding any royal prerogative, or anything contained in *The Interpretation Act* or in *The Supreme and Exchequer Courts Act*, no appeal shall be brought in any criminal case from any judgment or order of any court in Canada to any court of appeal or authority, by which in the United Kingdom appeals or petitions to Her Majesty in Council may be heard. 51 V., c. 43, s. 1.

This is a re-enactment, *verbatim*, of 51 Vict., c. 43, s. 1.

PART LIII.

SPECIAL PROVISIONS.

752. Further detention of person accused.—Whenever any person in custody charged with an indictable offence has taken proceedings before a judge or criminal Court having jurisdiction in the premises by way of *certiorari*, *habeas corpus* or otherwise, to have the legality of his imprisonment inquired into, such judge or Court may, with or without determining the question, make an order for the further detention of the person accused, and direct the judge or justice under whose warrant he is in custody, or any other judge or justice to take any proceedings, hear such evidence, or do such further act as in the opinion of the Court or judge may best further the ends of justice.

753. Reserve of final decision on questions raised at Trial.—Any judge or other person presiding at the sittings of a Court at which any person is tried for an indictable offence under this Act, whether he is the judge of such Court or is appointed by commission or otherwise to hold such sittings, may reserve the giving of his final decision on questions raised at the trial; and his decision, whenever given, shall be considered as if given at the time of the trial. R.S.C., c. 174, s. 269.

PROVISIONS AS TO ONTARIO.

754. Practice in High Court of Justice in Ontario.—The practice and procedure in all criminal cases and matters in the High Court of Justice of Ontario which are not provided for in this Act, shall be the same as the practice and procedure in similar cases and matters heretofore. R.S.C., c. 174, s. 270.

755. Commission of Court of Assize, etc., in Ontario.—If any general commission for the holding of a Court of Assize and *nisi prius*, Oyer and Terminer or general gaol delivery is issued by the Governor-General for any county or district in the province of Ontario, such commission shall contain the names of the Justices of the Supreme Court of Judicature for Ontario, and may also contain the names of the Judges of any of the County Courts in Ontario, and of any of Her Majesty's counsel learned in the law duly appointed for the province of Upper Canada, or for the province of Ontario, and if any such commission is for a provisional judicial district, such commission may contain the name of the judge of the district court of the said district.

2. The said courts shall be presided over by one of the justices of the said Supreme Court, or in their absence by one of such county court judges or by one of such counsel, or in the case of any such district by the judge of such district court. R.S.C., c. 174, s. 271.

756. Court of General Sessions, in Ontario.—It shall not be necessary for any Court of General Sessions in the province of Ontario to deliver the gaol of all prisoners who are confined upon charges of theft, but the Court may leave any such cases to be tried at the next Court of Oyer and Terminer and general gaol delivery, if, by reason of the difficulty or importance of the case, or for any other cause, it appears to it proper so to do. R.S.C., c. 174, s. 272.

757. Time for pleading to indictment in Ontario.—If any person is prosecuted in any division of the High Court of Justice for Ontario for any indictable offence, by information there filed, or by indictment there found or removed into such Court, and appears therein in term time in person, or, in case of a corporation, by attorney, to answer to such information or indictment, such defendant, upon being charged therewith, shall not imparl to a following term, but shall plead or demur thereto within four days from the time of his appearance; and in default of his pleading or demurring within four days as aforesaid judgment may be entered against such defendant for want of a plea. R.S.C., c. 174, s. 273.

758. Rule to Plead.—If such defendant appears to such information or indictment by attorney, he shall not imparl to a following term, but a rule, requiring him to plead, may forthwith be given and served, and a plea to such information or indictment may be enforced, or judgment in default may be entered in the same manner as might have been done formerly in cases in which the defendant had appeared to such information or indictment by attorney in a previous

term ; but the Court, or any Judge thereof, upon sufficient cause shown for that purpose, may allow further time for such defendant to plead or demur to such information or indictment. R.S.C., c. 174, s. 274.

759. **Delay in prosecution, in Ontario.**—If any prosecution for an indictable offence, instituted by the Attorney-General for Ontario in the said court, is not brought to trial within twelve months next after the plea of not guilty has been pleaded thereto, the Court in which such prosecution is depending, upon application made on behalf of any defendant in such prosecution of which application twenty days' previous notice shall be given to such Attorney-General, may make an order authorizing such defendant to bring on the trial of such prosecution ; and thereupon such defendant may bring on such trial accordingly unless a *nolle prosequi* is entered to such prosecution. R.S.C., c. 174, s. 275.

PROVISIONS AS TO NOVA SCOTIA.

760. **Calendar of criminal cases in Nova Scotia.**—In the province of Nova Scotia a calendar of the criminal cases shall be sent by the clerk of the Crown to the Grand Jury in each term, together with the depositions taken in each case and the names of the different witnesses, and the indictments shall not be made out, except in Halifax, until the Grand Jury so directs. R.S.C., c. 174, s. 276.

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.

762. **Application.**—The provisions of this part do not apply to the North-West Territories or the District of Keewatin. 52 V., c. 47, s. 3.

763. **Meanings of expressions.**—In this part, unless the context otherwise requires,—

(*a.*) the expression "Judge" means and includes,—

(i.) in the province of ONTARIO, any judge of a county court, junior judge or deputy judge authorized to act as chairman of the General Sessions of the Peace, and also the judges of the provisional districts of Algoma and Thunder Bay, and the judge of the district court of Muskoka and Parry Sound, authorized respectively 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 Queen's Bench, or any judge of a county court;

(v.) in the province of BRITISH COLUMBIA the chief justice or a puisne judge of the Supreme Court, or any judge of a county court;

(*b.*) the expression "County Attorney" or "Clerk of the Peace" includes in the Provinces of Nova Scotia, New Brunswick and Prince Edward Island, any clerk of a county court, and in the Province of Manitoba, any Crown Attorney, the Prothonotary of the Court of Queen's Bench, and any Deputy Prothonotary thereof, any deputy Clerk of the Peace, and the deputy Clerk of the Crown and Pleas for any district in the said province. 52 V., c. 47, s. 2.

764. Judge to be a Court of Record.—The judge sitting on any trial under this part, for all the purposes thereof and proceedings connected therewith or relating thereto, shall be a Court of Record, and in every province of Canada, except the province of Quebec, such Court shall be called "The County Court Judge's Criminal Court" of the county or union of counties or judicial district in which the same is held.

2. The record in any such case shall be filed among the records of the Court over which the judge presides, and as part of such records. 52 V., c. 47, s. 4.

765. Offences triable under this part.—Every person committed to gaol for trial on a charge of being guilty of any of the offences which are mentioned in section five hundred and thirty-nine as being within the jurisdiction of the General or Quarter Sessions of the Peace, may, with his own consent (of which consent an entry shall then be made of record), and subject to the provisions herein, be tried in any province under the following provisions out of sessions and out of the regular term or sittings of the Court, whether the Court before which, but for such consent, the said person would be triable for the offence charged, or the Grand Jury thereof, is or is not then in session, and if such person is convicted, he may be sentenced by the judge. 52 V., c. 47, s. 5.

This Article applies to the speedy trial of persons actually *committed for trial* for any of the offences triable before a Court of General or Quarter Sessions. Article 785, *post*, contains provisions under which persons charged with offences, triable at Sessions may, not only after being committed for trial but *when charged* with any such offence before a police Magistrate, or before a Stipendiary Magistrate, *in Ontario*, elect to be tried before such Magistrate.

766. Duty of Sheriff after committal of accused. — Every sheriff shall, within twenty-four hours after any prisoner charged as aforesaid is committed to gaol for trial, notify the judge in writing that such prisoner is so confined, stating his name and the nature of the charge preferred against him, whereupon, with as little delay as possible, such judge shall cause the prisoner to be brought before him. 52 V., c. 47, s. 6.

767. Arraignment of accused before Judge. — The judge, 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 such 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 demands a trial by Jury the judge shall remand him to gaol; but if he consents to be tried by the judge without a jury the county solicitor, clerk of the peace or other 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 to this Act, (1) 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. 52 V., c. 47, s. 7.

768. Persons jointly accused.—If one of two or more prisoners charged with the same offence demands a trial by Jury, and the other or others consent to be tried by the judge without a Jury, the judge, in his discretion, may remand all the said prisoners to gaol to await trial by a Jury. 52 V., c. 47, s. 8.

769. Election after refusal to be tried by Judge.—If under Part LV. (2) or Part LVI., (3) 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

(1) For Forms MM and NN see p. 680, and 681, *post*.

(2) Part LV, (comprising Articles 782–808), relates to Summary Trial of Indictable Offences.

(3) Part LVI. (comprising Articles 809–831), relates to Trial of Juvenile offenders for Indictable Offences.

place, notify the sheriff that he desires to re-elect; whereupon it shall be the duty of the sheriff to proceed as directed by section seven hundred and sixty-six, and thereafter the person so committed shall be proceeded against as if his said election in the first instance had not been made. 53 V., c. 37, s. 30.

770. Continuance of proceedings before another judge.—Proceedings under this part commenced before any judge may, where such judge is for any reason unable to act, be continued before any other judge competent to try prisoners under this part in the same judicial district, and such last mentioned judge shall have the same powers with respect to such proceedings as if such proceedings had been commenced before him, and may cause such portion of the proceedings to be repeated before him as he shall deem necessary. 53 V., c. 37, s. 30.

771. Election after committal under part LV or LVI.—If, on the trial under Part LV. or Part LVI. of this Act of any person charged with any offence triable under the provisions of this part, the magistrate or justices of the peace decide not to try the same summarily, but commit such person for trial, such person may afterwards, with his own consent, be tried under the provisions of this part. 52 V., c. 47, s. 10.

772. Trial of accused.—If the prisoner upon being so arraigned and consenting as aforesaid pleads not guilty the judge shall appoint an early day, or the same day, for his trial, and the county attorney or clerk of the peace shall subpœna the witnesses named in the depositions, or such of them and such other witnesses as he thinks requisite to prove the charge, to attend at the time appointed for such trial, and the judge may proceed to try such prisoner, and if he be found guilty sentence shall be passed as hereinbefore mentioned; but if he be found not guilty the judge shall immediately discharge him from custody, so far as respects the charge in question. 52 V., c. 47, s. 11.

773. Trial of offences other than those for which accused is committed.—The county attorney or clerk of the peace or other prosecuting officer may, with the consent of the judge, prefer against the prisoner a charge or charges for any offence or offences for which he may be tried under the provisions of this part other than the charge or charges for which he has been committed to gaol for trial, although such charge or charges do not appear or are not mentioned, in the depositions upon which the prisoner was so committed. 52 V., c. 47, s. 12.

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.

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.

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.**—Any recognizance taken under section five hundred and ninety-eight of this Act, for the purpose of binding a prosecutor or a witness, shall, if the person committed for trial elects to be tried under the provisions of this part, be obligatory on each of the persons bound thereby, as to all things therein mentioned with reference to the trial by the Judge under this part, as if such recognizance had been originally entered into for the doing of such things with reference to such trial: Provided, that at least forty-eight hours' notice in writing shall be given, either personally or by leaving the same at the place of residence of the persons bound by such recognizance as therein described, to appear before the Judge at the place where such trial is to be had. 53 V., c. 37, s. 29.

780. **Witnesses to attend throughout trial.**—Every witness, whether on behalf of the prisoner or against him, duly summoned or subpœnaed to attend and give evidence before such judge, sitting on any such trial, on the day appointed for the same, shall be bound to attend and remain in attendance throughout the trial; and if he fails so to attend he shall be held guilty of contempt of court, and may be proceeded against therefor accordingly. 52 V., c. 47, s. 18.

781. **Compelling attendance of Witnesses.**—Upon proof to the satisfaction of the judge of the service of subpœna upon any witness who fails to attend before him, as required by such subpœna, and upon such Judge being satisfied that the presence of such witness before him is indispensable to the ends of justice, he may, by his warrant, cause the said witness to be apprehended and forthwith brought before him to give evidence as required by such subpœna, and to answer for his disregard of the same; and such witness may be detained on such warrant before the said Judge, or in the common gaol, with a view to secure his presence as a witness; or, in

the discretion of the Judge, such witness may be released on recognizance with or without sureties, conditioned for his appearance to give evidence as therein mentioned, and to answer for his default in not attending upon the said subpœna, as for a contempt; and the Judge may, in a summary manner, examine into and dispose of the charge of contempt against the said witness who, if found guilty thereof, may be fined or imprisoned, or both, such fine not to exceed one hundred dollars, and such imprisonment to be in the common gaol, with or without hard labour, and not to exceed the term of ninety days, and he may also be ordered to pay the costs incident to the execution of such warrant and of his detention in custody.

2. Such warrant may be in the form OO (1) and the conviction for contempt in the form PP in schedule one to this Act, (2) 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.

FORMS UNDER PART LIV.

FROM SCHEDULE ONE.

MM.—(*Section* 767.)

FORM OF RECORD WHEN THE PRISONER PLEADS NOT GUILTY.

Canada,
Province of ,
County of .

Be it remembered that A. B. being a prisoner in the gaol of the said county, committed for trial on a charge of having on day of , in the year , stolen, &c. (*one cow, the property of* C. D., *or as the case may be, stating briefly the offence*) and having been brought before *me* (*describe the Judge*) on the day of , in the year , and asked by me if he consented to be tried before me without the intervention of a jury, consented to be so tried; and that upon the day of , in the year , the said A. B., being again brought before me for trial, and declaring himself ready, was arraigned upon the said charge and pleaded not guilty; and after hearing the evidence adduced, as well in support of the said charge as for the prisoner's defence (*or as the case may be*), I find him to be guilty of the offence with which he is charged as aforesaid, and I accordingly sentence him to (*here insert such sentence as the law allows and the Judge thinks right*), (*or* I find him not

(1) For Form OO, see p. 681, *post.*
(2) For Form PP, see p. 682, *post.*

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.

NN.—(*Section* 767.)

FORM OF RECORD WHEN THE PRISONER PLEADS GUILTY.

Canada,
Province of ,
County of .

Be it remembered that A. B. being a prisoner in the gaol of the said county, on a charge of having on the day of , in the year , stolen, &c., (*one cow, the property of C. D., or as the case may be, stating briefly the offence*), and being brought before me (*describe the Judge*) on the day of , in the year , and asked by me if he consented to be tried before me without the intervention of a Jury, consented to be so tried; and that the said A. B. being then arraigned upon the said charge, he pleaded guilty thereof, whereupon I sentenced the said A. B. to (*here insert such sentence as the law allows and the Judge thinks right*).

Witness my hand this day of , in the year .

O. K.,
Judge.

OO.—(*Section* 781.)

WARRANT TO APPREHEND WITNESS.

Canada,
Province of ,
County of .

To all or any of the constables and other peace officers in the said county of

Whereas it having been made to appear before me, that E. F., of , in the said county of , was likely to give material evidence on behalf of the prosecution (*or* defence, *as the case may be*) on the trial of a certain charge of (*as theft, or as the case may be*), against A. B., and that the said E. F. was duly subpœnaed (*or* bound under recognizance) to appear on the day of , in the year , at , in the said county at o'clock (forenoon *or* afternoon, *as the case may be*),

before me, to testify what he knows concerning the said charge against the said A. B.

And whereas proof has this day been made before me, upon oath of such subpœna having been duly served upon the said E. F., (*or* of the said E. F. having been duly bound under recognizance to appear before me, *as the case may be*); and whereas the said E. F. has neglected to appear at the trial and place appointed, and no just excuse has been offered for such neglect: These are therefore to command you to take the said E. F. and to bring him and have him forthwith before me, to testify what he knows concerning the said charge against the said A. B, and also to answer his contempt for such neglect.

Given under my hand, this day of , in the year .

O. K.,

Judge.

PP.—(*Section* 781.)

CONVICTION FOR CONTEMPT.

Canada,
Province of ,
County of .

Be it remembered that on the day of , in the year , in the county of , E. F. is convicted before me, for that he the said E. F. did not attend before me to give evidence on the trial of a certain charge against one A. B. of (*theft, or as the case may be*), although duly subpœnaed (*or* bound by recognizance to appear and give evidence in that behalf, *as the case may be*) but made default therein, and has not shown before me any sufficient excuse for such default, and I adjudge the said E. F., for his said offence, to be imprisoned in the common gaol of the county of , at , for the space of , there to be kept at hard labour (*and in case a fine is also intended to be imposed, then proceed,*) and I also adjudge that the said E. F. do forthwith pay to and for the use of Her Majesty a fine of dollars, and in default of payment, that the said fine, with the cost of collection, be levied by distress and sale of the goods and chattels of the said E. F. (*or in case a fine alone is imposed, then the clause of imprisonment is to be omitted.*)

Given under my hand at , in the said county of , the day and year first above mentioned.

O. K.,

Judge.

PART LV.

SUMMARY TRIAL OF INDICTABLE OFFENCES.

782. Definitions.—In this part, unless the context otherwise requires,

(*a.*) the expression "Magistrate" means and includes—

(i.) in the provinces of ONTARIO, QUEBEC and MANITOBA, any Recorder, Judge of a County Court, being a Justice of the Peace, Commissioner of Police, Judge of the Sessions of the Peace, Police Magistrate, District Magistrate, or other functionary or tribunal, invested by the proper legislative authority, with power to do alone such acts as are usually required to be done by two or more Justices of the Peace, and acting within the local limits of his or of its jurisdiction;

(ii.) in the provinces of NOVA SCOTIA and NEW BRUNSWICK, any Recorder, Judge of a county Court, Stipendiary Magistrate or Police Magistrate, acting within the local limits of his jurisdiction, and any Commissioner of Police and any functionary, tribunal or person invested by the proper legislative authority with power to do alone such acts as are usually required to be done by two or more Justices of the Peace;

(iii.) in the provinces of PRINCE EDWARD ISLAND and BRITISH COLUMBIA and in the district of KEEWATIN, any two Justices of the Peace sitting together, and any functionary or tribunal having the powers of two Justices of the Peace;

(iv.) in the NORTH-WEST TERRITORIES, any Judge of the Supreme Court of the said territories, any two Justices of the Peace sitting together, and any functionary or tribunal having the powers of two Justices of the Peace;

(*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.

783. Offences to be dealt with under this Part.—Whenever any person is charged before a Magistrate,

(*a.*) with having committed theft, or obtained money or property by false pretences, or unlawfully received stolen property, and the value of the property alleged to have been stolen, obtained or

received, does not, in the judgment of the Magistrate, exceed ten dollars; or

(*b.*) with having attempted to commit theft; or

(*c.*) with having committed an aggravated assault by unlawfully and maliciously inflicting upon any other person, either with or without a weapon or instrument, any grievous bodily harm, or by unlawfully and maliciously wounding any other person; or

(*d.*) with having committed an assault upon any female whatsoever, or upon any male child whose age does not, in the opinion of the Magistrate, exceed fourteen years, such assault being of a nature which cannot, in the opinion of the Magistrate, be sufficiently punished by a summary conviction before him under any other part of this Act, and such assault, if upon a female, not amounting, in his opinion, to an assault with intent to commit a rape; or

(*e.*) with having assaulted, obstructed, molested or hindered any peace officer or public officer in the lawful performance of his duty, or with intent to prevent the performance thereof; or

(*f.*) with keeping or being an 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.

784. When Magistrate shall have absolute Jurisdiction.—The jurisdiction of such Magistrate is absolute in the case of any person charged with keeping or being an inmate or habitual frequenter of any disorderly house, house of illfame or bawdy-house, and does not depend on the consent of the person charged to be tried by such Magistrate, nor shall such person be asked whether he consents to be so tried; nor do the provisions of this part affect the absolute summary jurisdiction given to any Justice or Justices of the Peace, in any case by any other part of this Act. (1) R.S.C., c. 176, s. 4.

(1) See, at the end of Part LVIII, a list of offences over which Justices have absolute summary jurisdiction.

2. The jurisdiction of the Magistrate is absolute in the case of any person who, being a seafaring person and only transiently in Canada and having no permanent domicile therein, is charged, either within, the city of Quebec as limited for the purpose of the police ordinance, or within the city of Montreal as so limited, or in any other seaport city or town in Canada where there is such Magistrate, with the commission therein of any of the offences hereinbefore mentioned, and also in the case of any other person charged with any such offence on the complaint of any such seafaring person whose testimony is essential to the proof of the offence ; and such jurisdiction does not depend on the consent of any such person to be tried by the Magistrate, nor shall such person be asked whether he consents to be so tried. R.S.C., c. 176, s. 5.

3. The jurisdiction of a Stipendiary Magistrate in the province of Prince Edward Island, and of a Magistrate in the district of Keewatin, under this part, is absolute, without the consent of the person charged. 52 V., c. 46, s. 1.

785. Summary trial in certain cases, in Ontario. — If any person is *charged*, in the province of ONTARIO before a Police Magistrate or before a Stipendiary Magistrate in any county, district or provisional county in such province, with having committed any offence for which he may be tried at a Court of General Sessions of the Peace, or if any person is COMMITTED TO A GAOL in the county, district or provisional county, under the warrant of any Justice of the Peace, for trial on a charge of being guilty of any such offence, such person may, *with his own consent*, be tried before such Magistrate, and may, if found guilty, be sentenced by the Magistrate to the same punishment as he would have been liable to if he had been tried before the Court of General Sessions of the Peace. R.S.C., c. 176, s. 7.

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 witnessess 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.

787. Punishment for certain offences under this part.—In the case of an offence charged under paragraph (*a*) or (*b*) of section seven hundred and eighty-three, the Magistrate, after hearing the whole case for the prosecution and for the defence, shall, if he finds the charge proved, convict the person charged and commit him to the common gaol or other place of confinement, there to be imprisoned, with or without hard labour, for any term not exceeding six months. R.S.C., c. 176, s. 10.

788. Punishment for certain other offences.—In any case summarily tried under paragraph (*c*), (*d*), (*e*), (*f*), (*g*), (*h*) or (*i*) of section seven hundred and eighty-three, if the Magistrate finds the charge proved, he may convict the person charged and commit him to the common gaol or other place of confinement, there to be imprisoned, with or without hard labour, for any term not exceeding six months, or may condemn him to pay a fine not exceeding, with the costs in the case, one hundred dollars, or to both fine and imprisonment not exceeding the said sum and term; and such fine may be levied by warrant of distress under the hand and seal of the Magistrate, or the person convicted may be condemned, in addition to any other imprisonment on the same conviction, to be committed to the common gaol or other place of confinement for a further term not exceeding six months, unless such fine is sooner paid. R.S.C., c. 176, s. 11.

789. Proceedings for offences in respect of property worth over ten dollars.—When any person is charged before a Magistrate with theft or with having obtained property by false pretenses, or with having unlawfully received stolen property, and the value of the property stolen, obtained or received exceeds ten dollars, and the evidence in support of the prosecution is, in the opinion of the Magistrate, sufficient to put the person on his trial for the offence charged, such Magistrate, if the case appears to him to be one which may properly be disposed of in a summary way, and may be adequately punished by vritue of the powers conferred by this part, shall reduce the charge to writing, and shall read it to the said person, and, unless such person is one who can be tried summarily without his consent, shall then put to him the question mentioned in section seven hundred and eighty-six, 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. R.S.C., c. 176, s. 12.

790. Punishment on plea of guilty in such case.—If the person charged as mentioned in the next preceding section consents to be tried by the Magistrate, the Magistrate shall then ask him whether he is guilty or not guilty of the charge, and if such person says that he is guilty, the Magistrate shall then cause a plea of guilty to be entered upon the proceedings, and sentence him to the same punishment as he would have been liable to if he had been convicted upon indictment in the ordinary way; and if he says that he is not guilty, the Magistrate shall proceed as provided in section seven hundred and eighty-six. 52 V., c. 46, s. 2.

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.

792. Election of trial by Jury to be stated on warrant of committal.—If, when his consent is necessary, the person charged elects to be tried before a Jury, the Magistrate shall proceed to hold a preliminary inquiry as provided in Parts XLIV. and XLV., and if the person charged is committed for trial, shall state in the warrant of committal the fact of such election having been made. R.S.C., c. 176, s 15.

793. Full defence allowed.—In every case of summary proceedings under this part the person accused shall be allowed to make his full answer and defence, and to have all witnesses examined and cross-examined by Counsel or Solicitor. R.S.C., c. 176, s. 16.

794. Proceedings to be in open Court.—Every Court held by a Magistrate for the purposes of this part shall be an open Public Court.

795. Procuring attendance of witnesses.—The Magistrate before whom any person is charged under the provisions of this part may, by summons, require the attendance of any person as a witness upon the hearing of the case, at a time and place to be named in such summons, and such Magistrate may bind, by recognizance, all persons whom he considers necessary to be examined, touching the matter of such charge, to attend at the time and place appointed by him and then and there to give evidence upon the hearing of such charge; and if any person so summoned, or required or bound as aforesaid, neglects or refuses to attend in pursuance of such summons or recognizance, and if proof is made of such person having been duly summoned as hereinafter mentioned, or bound by recognizance as aforesaid, the Magistrate before whom such person should have

attended may issue a warrant to compel his appearance as a witness. R.S.C., c. 176, s. 18.

796. **Service of summons.**—Every summons issued under the provisions of this part may be served by delivering a copy of the summons to the person summoned, or by delivering a copy of the summons to some inmate of such person's usual place of abode apparently over sixteen years of age; and every person so required by any writing under the hand of any Magistrate to attend and give evidence as aforesaid, shall be deemed to have been duly summoned. R.S.C., c. 176, s. 19.

797. **Dismissal of charge.**—Whenever the Magistrate finds the offence not proved, he shall dismiss the charge, and make out and deliver to the person charged a certificate under his hand stating the fact of such dismissal. R.S.C., c. 176, s. 20.

798. **Effect of conviction.**—Every conviction under this part shall have the same effect as a conviction upon indictment for the same offence. R.S.C., c. 176, s. 22.

799. **Certificate of dismissal a bar to further proceeding.**— Every person who obtains a certificate of dismissal or is convicted under the provisions of this part, shall be released from all further or other criminal proceedings for the same cause. R.S.C., c. 176, s. 23.

It has been held in England, under statutory provisions similar to the above that, where a case summarily dealt with has been dismissed by the Magistrate or Justice on its merits, the defendant has the right *ex debito justitiæ* to receive the certificate of dismissal. (1)

The certificate of dismissal should only be granted when there has been a full hearing on the merits. If granted on a withdrawal of the charge before hearing, it will be no bar to subsequent proceedings for the same offence. (2) See comments at pp. 183 and 184, *ante*. See also comments and authorities at pp. 596 and 597, and form of plea of summary conviction or acquittal, at p. 600, *ante*; and see Articles 821, 865 and 867 *post*.

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.

801. **Result of hearing to be filed in Court of Sessions.** — The Magistrate adjudicating under the provisions of this part shall transmit the conviction, or a duplicate of a 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 next Court of General or Quarter Sessions of the Peace or to the Court discharging the functions of a Court of General or Quarter Sessions

(1) Hancock v. Somes 1 E & E, 795; 28 L. J. (M. C.) 196. Costar v. Hetherington, 1 E & E, 802; 29 L. J. (M. C.) 198.
(2) Reed v. Nutt, 24 Q. B. D. 669.

of the Peace, for the district, county or place, there to be kept by the proper officer among the records of the Court. R.S.C., c. 176, s. 25.

802. Evidence of conviction or dismissal.—A copy of such conviction, or of such certificate of dismissal, certified by the proper officer of the Court, or proved to be a true copy, shall be sufficient evidence to prove a conviction or dismissal for the offence mentioned therein, in any legal proceedings. R.S.C., c. 176, s. 26.

803. Restitution of property.—The Magistrate by whom any person has been convicted under the provisions of this part may order restitution of the property stolen, or taken or obtained by false pretenses, in any case in which the Court, before whom the person convicted would have been tried, but for the provisions of this part, might by law order restitution. R.S.C., c. 176, s. 27.

804. Remand for further investigation.—Whenever any person is charged before any Justice or Justices of the Peace, with any offence mentioned in section seven hundred and eighty-three, and in the opinion of such Justice or Justices the case is proper to be disposed of summarily by a Magistrate, as herein provided, the Justice or Justices before whom such person is so charged may, if he or they see fit, remand such person for further examination before the nearest Magistrate in like manner in all respects as a Justice or Justices are authorized to remand a person accused for trial at any Court, under Part XLV., section five hundred and eighty-six ; but no Justice or Justices of the Peace, in any province, shall so remand any person for further examination or trial before any such Magistrate in any other province. Any person so remanded for further examination before a Magistrate in any city, may be examined and dealt with by any other Magistrate in the same city. R.S.C., c. 176, ss. 28, 29 and 30.

805. Non-appearance of accused under recognizance.—If any person suffered to go at large upon entering into such recognizance as the justice or justices are authorized, under Part XLV., section five hundred and eighty-seven, to take on the remand of a person accused, conditioned for his appearance before a 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 *primâ facie* evidence of such non-appearance without proof of the signature of the Magistrate thereto. R.S.C., c. 176, s. 31.

806. Application of fines.—Every fine and penalty imposed under the authority of this part shall be paid as follows, that is to say :—

(*a.*) In the province of Ontario, to the Magistrate who imposed the same, or the Clerk of the Court or Clerk of the Peace, as the

case may be, to be paid over by him to the County Treasurer for county purposes;

(*b.*) In any new district in the province of Quebec, to the Sheriff of such district, as Treasurer of the building and Jury fund for such district, to form part of such fund,—and if in any other district in the said province, to the Prothonotary of such district, to be applied by him, under the direction of the Lieutenant-Governor in Council, towards the keeping in repair of the Court-House in such district, or to be added by him to the moneys and fees collected by him for the erection of a court-house and gaol in such district, so long as such fees are collected to defray the cost of such erection;

(*c.*) In the provinces of Nova Scotia and New Brunswick, to the county treasurer for county purposes; and

(*d.*) In the provinces of Prince Edward Island, Manitoba and British Columbia, to the treasurer of the province. R.S.C., c. 176, s. 32.

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, (1) and whenever the nature of the case requires it, such forms may be altered by omitting the words stating the consent of the person to be tried before the magistrate, and by adding the requisite words, stating the fine imposed, if any, and the imprisonment, if any, to which the person convicted is to be subjected if the fine is not sooner paid. R.S.C., c. 176, s. 33.

808. Certain provisions not applicable to this Part.—The provisions of this Act relating to preliminary inquires before justices, except as mentioned in sections eight hundred and four and eight hundred and five and of Part LVIII., shall not apply to any proceedings under this part. Nothing in this part shall affect the provisions of Part LVI., and this part shall not extend to persons punishable under that part so far as regards offences for which such persons may be punished thereunder. R.S.C., c. 176, ss. 34 and 35.

FORMS UNDER PART LV.

FROM SCHEDULE ONE.

QQ.—(*Section* 807.)

CONVICTION.

Canada,
Province of ,
County of .

Be it remembered that on the day of in the year , at , A. B., being charged before

(1) For Forms RR, and SS, see p. 691, *post.*

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).

RR.—(*Section* 807.)

CONVICTION UPON A PLEA OF GUILTY.

Canada,
Province of ,
County of .

Be it remembered that on the day of in the year , at , A. B. being charged before me, the undersigned, , of the said (*city*) and consenting to my trying the charge summarily), for that he, the said A. B., (*&c., stating the offence, and the time and place when and where committed*), and pleading guilty to such charge, he is thereupon convicted before me of the said offence; and I adjudge him, the said A. B., for his said offence, to be imprisoned in the (and there kept to hard labour) for the term of

Given under my hand and seal, the day and year first above mentioned, at aforesaid.

J. S., [SEAL.]

J. P., (Name of county.)

SS.—(*Section* 807.)

CERTIFICATE OF DISMISSAL.

Canada,
Province of ,
County of .

I, the undersigned, , of the city (*or as the case may be*) of , certify that on the day of , in the year , at aforesaid, A. B., being charged before me (and consenting to my trying the charge summarily), for that he, the said A. B., (*&c., stating the offence charged, and the time and place*

when and where alleged to have been committed), I did, after having summarily tried the said charge, dismiss the same.

Given under my hand and seal, this day of , in the year , at aforesaid.

J. S., [SEAL.]

J. P., (*Name of county.*)

PART LVI.

TRIAL OF JUVENILE OFFENDERS FOR INDICTABLE OFFENCES.

809. Definitions.—In this part, unless the context otherwise requires,—

(*a.*) The expression "two or more justices," or "the justices" includes,—

(i.) in the provinces of Ontario and Manitoba any judge of the county court being a Justice of the Peace, Police Magistrate or Stipendiary Magistrate, or any two Justices of the Peace, acting within their respective jurisdictions;

(ii.) in the province of Quebec any two or more Justices of the Peace, the Sheriff of any district, except Montreal and Quebec, the Deputy Sheriff of Gaspé, and any Recorder, Judge of the Sessions of the Peace, Police Magistrate, District Magistrate or Stipendiary Magistrate acting within the limits of their respective jurisdictions;

(iii.) in the provinces of Nova Scotia, New Brunswick, Prince Edward Island, and British Columbia, and in the district of Keewatin, any functionary or tribunal invested by the proper legislative authority with power to do acts usually required to be done by two or more Justices of the Peace;

(iv.) in the North-West Territories, any Judge of the Supreme Court of the said territories, any two Justices of the Peace sitting together, and any functionary or tribunal having the powers of two Justices of the Peace;

(*b.*) The expression "the common gaol or other place of confinement" includes any reformatory prison provided for the reception of juvenile offenders in the province in which the conviction referred to takes place, and to which, by the law of that province, the offender may be sent. R.S.C., c. 177, s. 2.

810. Punishment for stealing.—Every person charged with having committed, or having attempted to commit any offence which is theft, or punishable as theft, and whose age, at the period of the commission or attempted commission of such offence, does not, in the

opinion of the justice before whom he is brought or appears, exceed the age of sixteen years, shall, upon conviction thereof in open Court upon his own confession or upon proof, before any two or more justices, be committed to the common gaol or other place of confinement within the jurisdiction of such justices, there to be imprisoned, with or without hard labour, for any term not exceeding three months, or, in the discretion of such justices, shall forfeit and pay such sum, not exceeding twenty dollars, as such justices adjudge. R.S.C., c. 177, s. 3.

811. Procuring Appearance of Accused.—Whenever any person, whose age is alleged not to exceed sixteen years, is charged with any offence mentioned in the next proceeding section, on the oath of a credible witness, before any justice of the peace, such justice may issue his summons or warrant, to summon or to apprehend the person so charged, to appear before any two justices of the peace, at a time and place to be named in such summons or warrant. R.S.C, c. 177, s. 4.

812. Remand of Accused.—Any justice of the peace, if he thinks fit, may remand for further examination or for trial, or suffer to go at large, upon his finding sufficient sureties, any such person charged before him with any such offence as aforesaid.

2. Every such surety shall be bound by recognizance conditioned for the appearance of such person before the same or some other justice or justices of the peace for further examination, or for trial before two or more justices of the peace as aforesaid, or for trial by indictment at the proper Court of Criminal Jurisdiction, as the case may be.

3. Every such recognizance may be enlarged, from time to time, by any such justice or justices to such further time as he or they appoint; and every such recognizance not so enlarged shall be discharged without fee or reward, when the person has appeared according to the condition thereof. R.S.C., c. 177, ss. 5, 6 and 7.

813. Accused to elect how he shall be tried.—The justices before whom any person is charged and proceeded against under the 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.

814. When Accused shall not be tried summarily.—If the justices are of opinion, before the person charged has made his defence, that the charge is, from any circumstance, a fit subject for prosecution by indictment, or if the person charged, upon being called upon to answer the charge, objects to the case being summarily disposed of under the provisions of this part, the justices shall not deal with it summarily, but may proceed to hold a preliminary inquiry as provided in Parts XLIV. and XLV.

2. In case the accused has elected to be tried by a jury, the justices shall state in the warrant of commitment the fact of such election having been made. R.S.C., c. 177, s. 9.

815. Summons to witness.—Any Justice of the Peace may, by summons, require the attendance of any person as a witness upon the hearing of any case before two Justices, under the authority of this part, at a time and place to be named in such summons. R.S.C., c. 177, s. 10.

816. Binding over witness.—Any such Justice may require and bind by recognizance every person whom he considers necessary to be examined, touching the matter of such charge, to attend at the time and place appointed by him and then and there to give evidence upon the hearing of such charge. R.S.C., c. 177, s. 11.

817. Warrant against witness.—If any person so summoned or required or bound, as aforesaid, neglects or refuses to attend in pursuance of such summons or recognizance, and if proof is given of such person having been duly summoned, as hereinafter mentioned, or bound by recognizance, as aforesaid, either of the Justices before whom any such person should have attended, may issue a warrant to compel his appearance as a witness. R.S.C., c. 177, s. 12.

818. Service of summons.—Every summons issued under the authority of this part may be served by delivering a copy thereof to the person, or to some inmate, apparently over sixteen years of age, at such person's usual place of abode, and every person so required by any writing under the hand or hands of any Justice or Justices to attend and give evidence as aforesaid, shall be deemed to have been duly summoned. R.S.C., c. 177, s. 13.

819. Discharge of accused.—If the Justices, upon the hearing of any such case deem the offence not proved, or that it is not expedient to inflict any punishment, they shall dismiss the person charged,—in the latter case on his finding sureties for his future good behaviour, and in the former case without sureties, and then make out and deliver to the person charged a certificate in the form TT in schedule one to this Act, (1) or to the like effect, under the hands of such Justices, stating the fact of such dismissal. R.S.C., c. 177, s. 14.

820. Form of conviction.—The Justices before whom any person is summarily convicted of any offence hereinbefore mentioned, may

(1) For Form TT, see p. 698, *post*.

cause the conviction to be drawn up in the form UU in schedule one hereto, (1) or in any other form to the same effect, and the conviction shall be good and effectual to all intents and purposes.

2. No such conviction shall be quashed for want of form, or be removed by *certiorari* or otherwise into any Court of record; and no warrant of commitment shall be held void by reason of any defect therein, if it is therein alleged that the person has been convicted, and there is a good and valid conviction to sustain the same. R.S.C. c. 177, ss. 16 and 17.

821. Further proceeding barred.—Every person who obtains such certificate of dismissal, or is so convicted, shall be released from all further or other criminal proceedings for the same cause. R.S.C., c. 177, s. 15.

See comments and authorities at pp. 183, 184, 596 and 597, *ante*, also form of plea of summary conviction or acquittal, at p. 600, *ante*; and see also Articles 797, 798, 799 *ante*, and 865 and 867 *post*.

822. Conviction and recognizances to be filed.—The Justices before whom any person is convicted under the provisions of this part shall forthwith transmit the conviction and recognizances to the clerk of the peace or other proper officer, for the district, city, county or union of counties wherein the offence was committed, there to be kept by the proper officer among the records of the Court of General or Quarter Sessions of the Peace, or of any other Court discharging the functions of a Court of General or Quarter Sessions of the Peace. R.S.C., c. 177, s. 18.

823. Quarterly returns.—Every clerk of the peace, or other proper officer, shall transmit to the Minister of Agriculture a quarterly return of the names, offences and punishments mentioned in the convictions, with such other particulars as are, from time to time, required. R.S.C., c. 177, s. 19.

824. Restitution of property.—No conviction under the authority of this part shall be 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.

(1) For Form UU, see p. 698 *post*.

825. Proceeding on non-payment of penalty imposed.—Whenever the Justices adjudge any offender to forfeit and pay a pecuniary penalty under the authority of this part, and such penalty is not forthwith paid they may, if they deem it expedient, appoint some future day for the payment thereof, and order the offender to be detained in safe custody until the day so appointed, unless such offender gives security to the satisfaction of the Justices, for his appearance on such day ; and the Justices may take such security by way of recognizance or otherwise in their discretion.

2. If at any time so appointed such penalty has not been paid, the same or any other Justices of the Peace may, by warrant under their hands and seals, commit the offender to the common gaol or other place of confinement within their jurisdiction, there to remain for any time not exceeding three months, reckoned from the day of such adjudication. R.S.C., c. 177, ss. 23 and 24.

826. Costs.—The Justices before whom any person is prosecuted or tried for any offence cognizable under this part may, in their discretion, at the request of the prosecutor or of any other person who appears on recognizance or summons to prosecute or give evidence against such person, order payment to the prosecutor and witnesses for the prosecution, of such sums as to them seem reasonable and sufficient, to reimburse such prosecutor and witnesses for the expenses they have severally incurred in attending before them, and in otherwise carrying on such prosecution, and also to compensate them for their trouble and loss of time therein, —and may order payment to the constables and other Peace officers for the apprehension and detension of any person so charged.

2. The Justices may, although no conviction takes place, order all or any of the payments aforesaid to be made, when they are of opinion that the persons, or any of them, have acted in good faith. R.S.C., c. 177, ss. 25 and 26.

827. Application of fines. — Every fine imposed under the authority of this part shall be paid and applied as follows, that is to say :—

(*a.*) In the province of Ontario to the Justices who impose the same or the Clerk of the county Court, or the Clerk of the Peace, or other proper officer, as the case may be, to be by him or them paid over to the county treasurer for county purposes ;

(*b.*) In any new district in the province of Quebec to the Sheriff of such district as treasurer of the Building and Jury Fund for such district to form part of such fund, and in any other district in the province of Quebec to the prothonotary of such district, to be applied by him, under the direction of the Lieutenant-Governor in Council, towards the keeping in repair of the Court-House in such district or to be added by him to the moneys or fees collected by him for the erection of a Court-House or gaol in such district, so long as such fees are collected to defray the cost of such erection ;

(*c.*) In the provinces of Nova Scotia and New Brunswick to the county treasurer, for county purposes; and

(*d.*) In the provinces of Prince Edward Island, Manitoba and British Columbia to the treasurer of the province. R.S.C., c. 177, s. 27.

828. Costs to be certified by Justices.—The amount of expenses of attending before the Justices and the compensation for trouble and loss of time therein, and allowances to the constables and other peace officers for the apprehension and detention of the offender, and the allowances to be paid to the prosecutor, witnesses and constables for attending at the trial or examination of the offender, shall be ascertained by and certified under the hands of such Justices; but the amount of the costs, charges and expenses attending any such prosecution, to be allowed and paid as aforesaid, shall not in any one case exceed the sum of eight dollars.

2. Every such order of payment to any prosecutor or other person, after the amount thereof has been certified by the proper Justices of the Peace as aforesaid, shall be forthwith made out and delivered by the said Justices or one of them, or by the Clerk of the Peace or other proper officer, as the case may be, to such prosecutor or other person, upon such clerk or officer being paid his lawful fee for the same, and shall be made upon the officer to whom fines imposed under the authority of this part are required to be paid over in the district, city, county or union of counties in which the offence was committed, or was supposed to have been committed, who, upon sight of every such order, shall forthwith pay to the person named therein, or to any other person duly 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.—Nothing in this Part shall prevent the summary conviction of any person who may be tried thereunder before one or more justices of the peace, for any offence for which he is liable to be so convicted under any other Part of this Act or under any other Act. R.S.C., c. 177, s. 8, part.

FORMS UNDER PART LVI.

FROM SCHEDULE ONE.

TT.—(*Section* 819.)

CERTIFICATE OF DISMISSAL.

Canada, Province of , County of } , justice of the peace for the of , (*or if a recorder; &c.*,

I, a , of the of , *as the case may be*), do hereby certify that on the day of , in the year at , in the said of , A. B., was brought before us, the said justices (*or* me, the said) charged with the following offence, that is to say (*here state briefly the particulars of the charge*), and that we, the said justices, (*or* I, the said) thereupon dismissed the said charge.

Given under our hands and seals, (*or* my hand and seal) this day of , in the year , at aforesaid.

J. P. [SEAL.]
J. R. [SEAL.]
or S. J. [SEAL.]

UU.—(*Section* 820.)

CONVICTION.

Canada, Province of , County of ,

Be it remembered that on the day of , in the year , at , in the county of , A. B. is convicted before us, J. P. and J. R., Justices of the Peace for the said county (*or* me, S. J., *recorder*, of the , of , *or as the case may be*) for that he, the said A. B., did (*specify the offence and the time and place when and where the same was committed, as the case may be, but without setting forth the evidence*), and we, the said J. P. and J. R. (*or* I, the said S. J.), adjudge the said A. B., for his said offence, to be imprisoned in the (*or* to be imprisoned in the , and there kept at hard labour), for the space of , (*or* we) (*or* I) adjudge the said A. B., for his said offence, to forfeit and pay (*here state the penalty actually imposed*), and in default of immediate payment of the said sum, to be imprisoned in the (*or* to be imprisoned in the

and kept at hard labour) for the term of , unless the said sum is sooner paid.

Given under our hands and seals (*or* my hand and seal), the day and year first above mentioned.

J. P. [SEAL.]
J. R. [SEAL.]
or S. J. [SEAL.]

PART LVII.

COSTS AND PECUNIARY COMPENSATION—RESTITUTION OF PROPERTY.

832. Costs.—Any Court by which and any Judge under Part LIV. or Magistrate under LV. (1) by whom judgment is pronounced 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 it seems fit so to do; and the payment of such costs and expenses, or any part thereof, may be ordered by the Court to be made out of any moneys taken from such person on his apprehension (*if such moneys are his own*), or may be enforced at the instance of any person liable to pay or who has paid the same in such and the same manner (subject to the provisions of this Act) as the payment of any costs ordered to be paid by the judgment or order of any Court of competent jurisdiction in any civil action or proceeding may for the time being be enforced: Provided, that in the meantime, and until the recovery of such costs and expenses from the person so convicted as aforesaid, or from his estate, the same shall be paid and provided for in the same manner as if this section had not been passed; and any money which is recovered in respect thereof from the person so convicted, or from his estate, shall be applicable to the reimbursement of any person or fund by whom or out of which such costs and expenses have been paid or defrayed. 33-34 V. (U. K.) c. 23, s. 3.

It will be seen by this Article that costs may be awarded against a defendant when convicted of treason or any indictable offence.

This provision is to the same effect as the Imperial statute 33-34 Vict. c. 23, s. 3, except that the latter only covers cases of treason and felony and does not apply to convictions for misdemeanor: and the English Act does not contain the words

(1) Part LIV relates to *Speedy* Trials of Indictable offences, and comprises Articles 762 to 781, *ante*; and Part LV relates to the *Summary* Trial of Indictable offences, and comprises Articles 782 to 808 *ante*.

" if such moneys are his own " above italicised. In a case where a prisoner, arrested on the 4th April, was convicted at the following May Sessions of the Central Criminal Court, the Court after passing sentence, made under the above provision of the Imperial statute, an order for the payment of the costs of the prosecution out of the money taken from him at the time of his apprehension. On the 24th of April,—between the time of his apprehension and his conviction, —he had been adjudged bankrupt; and it was held,—without deciding what would have been the case if the money in question, though in the possession of, had not really belonged to the prisoner, or if the act of bankruptcy had been previous to his apprehension,—that the order was valid, on the ground that the subsequent bankruptcy could not affect the right of the Criminal Court to make the order, such right having vested at the time of the apprehension and before the bankruptcy. (1)

833. Costs in case of Libel.—In the case of an indictment or information by a private prosecutor for the publication of a defamatory libel if judgment is given for the defendant, he shall be entitled to recover from the prosecutor the costs incurred by him by reason of such indictment or information either by warrant of distress issued out of the said Court, or by action or suit as for an ordinary debt. R.S.C., c. 124, ss. 153 and 154.

834. Costs on Conviction for Assault.—If a person convicted on an indictment for assault, whether with or without battery and wounding, is ordered to pay costs as provided in section eight hundred and thirty-two he shall be liable unless the said costs are sooner paid. to three months' imprisonment, in addition to the term of imprisonment, if any, to which he is sentenced for the offence, and the Court may, by warrant in writing, order the amount of such costs to be levied by distress and sale of the goods and chattels of the offender, and paid to the prosecutor, and the surplus, if any, arising from such sale, to the owner; and if such sum is so levied, the offender shall be released from such imprisonment. R.S.C., c. 174, ss. 245 and 249.

835. Taxation of costs.—Any costs ordered to be paid by a Court pursuant to the foregoing provisions shall, in case there is no tariff of fees provided with respect to criminal proceedings, be taxed by the proper officer of the Court according to the lowest scale of fees allowed in such Court in a civil suit.

2. If such Court has no civil jurisdiction, the fees shall be those allowed in civil suits in a Superior Court of the province according to the lowest scale.

836. Compensation for loss of property.—A Court on the trial of any person on an indictment may, if it thinks fit, upon the application of any person aggrieved and immediately after the conviction of the offender, award any sum of money, not exceeding one thousand dollars, by way of satisfaction or compensation for any loss of property suffered by the applicant through or by means of the offence of which such person is so convicted; and the amount awarded for such satisfaction or compensation shall be deemed a judgment

(1) R. v. Roberts, 43 L. J. (M. C.) 17: L. R. 9 Q. B. 77.

debt due to the person entitled to receive the same from the person so convicted, and the order for payment of such amount may be enforced in such and the same manner as in the case of any costs ordered by the Court to be paid under section eight hundred and thirty-two. 33-34 V. (U.K) c. 23, s. 4.

This Article is derived from and extends,—to all cases of *persons tried upon an indictment*,—the provisions of sec. 4, of the Imperial Act, 33-34 Vict, c. 23, upon which Archbold comments as follows :—

"The discretionary power given by this section is far more extensive that the power conferred by the 24-25 Vict. c. 96, s. 100; (1), and, if exercised in every case to which it may in strictness be applicable, will compel a Criminal Court at the close of many trials for felony to enter upon complicated enquiries involving the expenditure of a large amount of time and labor. It is probable however that Criminal Courts will decline to exercise the powers thus conferred upon them, except in very simple cases, and will, in the majority of instances, leave the applicant to enforce his right by the ordinary civil procedure." (2)

It will be seen that the power conferred by the above Article is limited to the awarding of compensation for a *loss of property*. It would appear, therefore, as pointed out by Archbold that, in the case of serious *personal injuries* caused by an indictable offence, no compensation could under this Article, be awarded in respect of such personal injuries, and that even where the personal injuries caused by the indictable offence may have incapacitated the prosecutor from earning his livelihood, it would not be such a loss of property as would form the subject of compensation under this Article. (3)

"The expression 'PROPERTY' includes :—(i) every kind of real and personal property, and all deeds and instruments relating to or evidencing the titles 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 any thing 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." (Article 3 (*v.*) *ante.*)

837. Compensation to bonâ fide purchaser of stolen property.—When any prisoner has been convicted, either summarily or otherwise, of any theft or other offence, including the stealing or unlawfully obtaining any property, and it appears to the Court, by the evidence, that the prisoner sold such property or part of it to any person who had no knowledge that it was stolen or unlawfully obtained, and that money has been taken from the prisoner on his apprehension, the Court may, on application of such purchaser and on restitution of the property to its owner, order that, out of the money so taken from the prisoner, (if it is his), a sum, not exceeding

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(1) For provisions similar to those contained in the Imperial statute 24 and 25, Vict. c. 96, sec. 100, see Article 838, *post*, which is a re-enactment, (with certain changes) of R.S.C. c. 174, sec. 250.

(2) Arch. Cr. Pl. & Ev. 21 Ed., 206.

(3) *Ib.*

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.—(*As amended by* 56 *Vict. c.* 32). 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 *bonâ fide* paid or discharged by any person liable to the payment thereof, or being a negotiable instrument, has been *bonâ fide* taken or received by transfer or delivery, by any person, for a just and valuable consideration, without any notice or without any reasonable cause to suspect that the same had, by any indictable offence, been stolen, or if 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.

4. Nothing in this section contained shall apply to the case of any prosecution of any trustee, banker, merchant, attorney, factor, broker or other agent intrusted with the possession of goods or documents of title to goods, for any indictable offence under sections three hundred and twenty, or three hundred and sixty-three of this Act R.S.C., c. 174, s. 250.

Clause 3 of this Article makes an exception in favor of an innocent third party who has purchased, for value, the stolen property, and *who has acquired a lawful title thereto*, that is, a lawful title according to the law, as to civil rights, of the province where the offence has been committed. For instance, by the law of the province of Quebec, "If a thing lost or stolen be bought in good faith, in a fair or market or at a public sale, or from a trader dealing in similar articles, the owner cannot reclaim it, without re-imbursing to the purchaser the price he has paid for it:" and "If the thing lost or stolen be sold under the authority of law, it cannot be reclaimed." (1)

The power to award restitution of property under the above Article extends

(1) See Articles 1489 and 1490 Civ. Code, L. C.

to the *proceeds* of the property as well as the property itself. Therefore, if the property stolen, has been sold before the conviction, an application may be made to the Court, before which the criminal is convicted, for the restitution of the proceeds, which, of they are in the hands of the criminal or of an agent who holds them for him, should be granted. (1)

Where, after the trial and conviction of a prisoner for larceny, the judges who presided at the trial ordered property found in his possession, when arrested, to be disposed of in a particular manner, such property not being part of that stolen nor connected therewith, it was held that the order was bad, as the Judges had no jurisdiction to make it. (2)

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 eight hundred and seventy-nine ;

(*c.*) the expression " territorial division " means district, county, union of counties, township, city, town, parish or other judicial division or place ;

(*d.*) the expression " district " or " county " includes any territorial or judicial division or place in and for which there is such Judge, Justice, Justice's Court, officer or prison as is mentioned in the context ;

(*e.*) the expression " common gaol " or " prison " means any place other than a penitentiary in which persons charged with offences are usually kept and detained in custody. R.S.C., c. 178, s. 2.

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

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(1) R. v. Justices Cent. Crim. Ct., 17 Q. B. D. 598 ; 55 L. J. (Q.B.) 183 ; *affirmed* 18 Q. B. D. 314 : 56 L. J. (M. C.) 25. See Article 3 (*n.*) *ante.*

(2) R. v. Corporation of City of London, E.B. & E. 509 ; 27 L.J. (M.C.) 231 ; R. v. Pierce, Bell, 235.

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.

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.

It will be seen by this Article that in summary matters, not otherwise specially limited, the prosecution must be commenced *by the making of the complaint or* the laying of the information within six months, (in all places except the N. W. Territories where the time limited is twelve months), from the time when the matter of complaint or information arose. But the laying of the complaint or the making of the information should be followed up by useful proceedings in the shape of a warrant or summons and the arrest of or otherwise bringing the defendant before the Magistrate or Justice. See authorities and comments under Art. 551, at pp 519 and 520 *ante*.

842. Jurisdiction.—Every complaint and information shall be heard, tried, determined and adjudged by one justice or two or more justices as directed by the Act or law, upon which the complaint or information is framed or by any other Act or law in that behalf.

2. If there is no such direction in any Act or law, then the complaint or information may be heard, tried determined and adjudged by any one justice for the territorial division where the matter of the complaint or information arose: Provided that 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. (1)

843. Hearing before justices.—The provisions of Parts XLIV. and XLV. of this Act relating to compelling the appearance of the accused before the justice receiving an information under section five hundred and fifty-eight and the provisions respecting the attendance of witnesses on a preliminary inquiry and the taking of evidence thereon, shall, so far as the same are applicable, except as varied by sections immediately following, apply to any hearing under the provisions of this part: Provided that whenever a warrant is issued in the first instance against a person charged with 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.

844. Backing warrants.—The provisions of section five hundred and sixty-five relating to the endorsement of warrants shall apply to the case of any warrant issued under the provisions of this part against the accused, whether before or after conviction, and whether for the apprehension or imprisonment of any such person. R.S.C., c. 178, s. 22; 52 V., c. 45, s. 4.

845. Informations and complaints.—It shall not be necessary that any complaint upon which a Justice may make an order for the payment of money or otherwise shall be in writing, unless it is so required by some particular Act or law upon which such complaint is founded.

(1) See alphabetical list, at the end of this part, of offences which are, for the most part, non-indictable, and over which Justices have absolute summary jurisdiction. (pp. 647–650, *post*.

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.

846. Certain objections not to vitiate proceedings.—No information, complaint, warrant, conviction or other proceeding under this part shall be deemed objectionable or insufficient on any of the following grounds; that is to say:

(*a.*) that it does not contain the name of the person injured, or intended or attempted to be injured; or

(*b.*) that it does not state who is 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.

See Article 613, and comments, at p. 584, *ante*.

847. Variance.—No objection shall be allowed to any information, complaint, summons or warrant for any alleged defect therein, in substance or in form, or for any variance between such information, complaint, summons or warrant and the evidence adduced on the part of the informant or complainant at the hearing of such information or complaint.

2. Any variance between the information for any offence or act punishable on summary conviction and the evidence adduced in support thereof as to the time at which such offence or act is alleged to have been committed, shall not be deemed material if it is proved that such information was, in fact, laid within the time limited by law for laying the same.

3. Any variance between the information and the evidence adduced in support thereof, as to the place in which the offence or act is alleged to have been committed, shall not be deemed material if the offence or act is proved to have been committed within the jurisdiction of the justice by whom the information is heard and determined.

4. If any such variance, or any other variance between the information, complaint, summons or warrant, and the evidence

adduced in support thereof, appears to the Justice present and acting at the hearing to be such that the defendant has been thereby deceived or misled, the Justice may, upon such terms as he thinks fit, adjourn the hearing of the case to some future day. R.S.C., c. 178, s. 28.

See Article 723, and comments, at p. 655, *ante*.

848. **Execution of warrant.**—A summons may be issued to procure the attendance, on the hearing of any charge under the provisions of this part, of a witness who resides out of the jurisdiction of the Justices before whom such charge is to be heard, and such summons and a warrant issued to procure the attendance of a witness, whether in consequence of refusal by such witness to appear in obedience to a summons or otherwise, may be respectively served and executed by the constable or other peace officer to whom the same is delivered or by any other person, as well beyond as within the territorial division of the Justice who issued the same. 51 V., c. 45, ss. 1 and 3.

849. **Hearing to be in Open Court.**—The room or place in which the Justice sits to hear and try any complaint or information shall be deemed an open and public Court, to which the public generally may have access so far as the same can conveniently contain them. R.S.C., c. 178, s. 33.

850. **Counsel for parties.**—The person against whom the complaint is made or information laid shall be admitted to make his full answer and defence thereto, and to have the witnesses examined and cross-examined by counsel or attorney on his behalf.

2. Every complainant or informant in any such case shall be at liberty to conduct the complaint or information, and to have the witnesses examined and cross-examined, by counsel or attorney on his behalf. R.S.C., c. 178, ss. 34 and 35.

As to the defendant's right to give evidence on his own behalf, see sec. 4 of the Canada Evidence Act 1893, *post*, and comments thereon, and authorities, in reference to evidence upon the trial of offences under provincial Acts.

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.

852. **Evidence.**—If the information or complaint in any case negatives any exemption, exception, proviso or condition in the statute on which the same is founded it shall not be necessary for the prosecutor or complainant to prove such negative, but the defendant may prove the affirmative thereof in his defence if he wishes to avail himself of the same. R.S.C., c. 178, s. 38.

853. **Non-appearance of Accused.**—In case the accused does not appear at the time and place appointed by any summons issued by

a Justice on information before him of the commission of an offence punishable on summary conviction then, if it appears to the satisfaction of the Justice that the summons was duly served, a reasonable time before the time appointed for appearance, such Justice may proceed *ex parte* to hear and determine the case *in the absence of the defendant*, as fully and effectually, to all intents and purposes, as if the defendant had personally appeared in obedience to such summons, or the Justice, may, if he thinks fit, issue his warrant as provided by section five hundred and sixty-three of this Act and adjourn the hearing of the complaint or information until the defendant is apprehended. R.S.C., c. 178, s. 39.

Before proceeding in the absence of the defendant, as provided by this Article, the service and manner of service of the summons should be sworn to, and the Justice should be satisfied that a reasonable time has elapsed since the service to enable the defendant to obey it. He should have strong grounds for concluding that the summons has reached or come to the knowledge of the defendant and that he is wilfully disobeying it; and the evidence to satisfy him of this should be much stronger where the warrant was not served personally than where it was served personally. (1) In case of doubt, the other course of issuing a warrant should be taken.

854. Non-appearance of Prosecutor.—If, upon the day and at the place so appointed, the defendant appears voluntarily in obedience to the summons in that behalf served upon him, or is brought before the Justice by virtue of a warrant, then, if the complainant or informant, having had due notice, does not appear by himself, his counsel or attorney, the Justice shall dismiss the complaint or information, unless he thinks proper to adjourn the hearing of the same until some other day upon such terms as he thinks fit. R.S.C., c. 178, s. 41.

855. Proceedings when both parties appear.—If both parties appear, either personally or by their respective counsel or attorneys, before the Justice who is to hear and determine the complaint or information, such Justice shall proceed to hear and determine the same. R.S.C., c. 178, s. 42.

856. Arraignment of Accused.—If the defendant is present at the hearing, the substance of the information or complaint shall be stated to him, and he shall be asked if he has any cause to show why he should not be convicted, or why an order should not be made against him, as the case may be.

2. If the defendant thereupon admits the truth of the information or complaint, and shows no sufficient cause why he should not be convicted, or why an order should not be made against him, as the case may be, the justice present at the hearing shall convict him or make an order against him accordingly.

3. If the defendant does not admit the truth of the information or complaint, the justice shall proceed to inquire into the charge and for the purposes of such inquiry shall take the evidence of witnesses

(1) R. v. Smith, L. R., 10 Q. B. 604; R. v. Mabee 17 O. R. 194; Read v. Hunter8 C. L. T. 428.

both for the complainant and accused in the manner provided by Part XLV. in the case of a preliminary inquiry : Provided that the prosecutor or complainant is not entitled to give evidence in reply if the defendant has not adduced any evidence other than as to his general character ; provided further, that in a hearing under this section the witnesses need not sign their depositions. R.S.C., c. 178, ss. 43, 44 and 45.

857. Adjournment.—Before or during the hearing of any information or complaint the justice may, in his discretion adjourn the hearing of the same to a certain time or place to be then appointed and stated in the presence and hearing of the party or parties, or of their respective solicitors or agents then present, but *no such adjournment shall be for more than eight days.*

2. If, at the time and place to which the hearing or further hearing is adjourned, either or both of the parties do not appear, personally or by his or their counsel or solicitors respectively, before the Justice or such other Justice as shall then be there, the Justice who is then there may proceed to the hearing or further hearing as if the party or parties were present.

3. If the prosecutor or complainant does not appear the Justice may dismiss the information, with or without costs as to him seems fit.

4. Whenever any Justice adjourns, the hearing of any case, he may suffer the defendant to go at large or may commit him to the common gaol or other prison within the territorial division for which such Justice is then acting, or to such other safe custody as such Justice thinks fit, or may discharge the defendant upon his recognizance, with or without sureties at the discretion of such Justice, conditioned for his appearance at the time and place to which such hearing or further hearing is adjourned.

5. Whenever any defendant who is discharged upon recognizance, or allowed to go at large, does not appear at the time mentioned in the recognizance or to which the hearing or further hearing is adjourned, the Justice may issue his warrant for his apprehension R.S.C., c. 178, ss. 48, 49, 50 and 51.

Adjournments cannot exceed eight days, even with the consent of all parties. (1)

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.

859. Form of conviction.—If the Justice convicts or makes an order against the defendant a minute or memorandum thereof shall

(1) R. v. French, 13 O. R. 80.

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 (1) as is applicable to the case or to the like effect. R.S.C., c. 178, s. 53.

860. Disposal of penalties on conviction of joint offenders.—When several persons join in the commission of the same offence, and upon conviction thereof each is adjudged to pay a penalty which includes the value of the property, or the amount of the injury done, no further sum shall be paid to the person aggrieved than such amount or value, and costs, if any, and the residue of the penalties imposed shall be applied in the same manner as other penalties imposed by a Justice are directed to be applied. R.S.C., c. 178, s. 54.

861. First conviction in certain cases.—Whenever any person is summarily convicted before a Justice of any offence against Parts XX. to XXX. inclusive or Part XXXVII. of this Act and it is a first conviction, the Justice may, if he thinks fit, discharge the offender from his conviction upon his making such satisfaction to the person aggrieved, for damages and costs, or either of them, as are ascertained by the Justice. R.S.C., c. 178, s. 55.

Parts XX to XXIII relate to ASSAULTS, RAPE, LIBEL, etc.; parts XXIV to XXX relate to THEFT, BURGLARY, etc., and part XXXVII relates to MISCHIEF.

862. Certificate of dismissal.—If the Justice dismisses the information or complaint he may, when required so to do, make an order of dismissal in the form BBB in schedule one hereto, (2) and he shall give the defendant a certificate in the form CCC in the said schedule. (3) 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.

See comments and authorities at pp. 183 and 184, also at pp. 596 and 597, and under Articles 797, 798 and 799, at p. 688, *ante*.

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.

864. Assaults.—Whenever any person unlawfully assaults or beats any other person, any Justice may summarily hear and determine the charge, unless at the time of entering upon the investigation the person aggrieved or the person accused objects thereto.

(1) For forms VV to AAA see pp. 728-732, *post*.
(2) For form BBB, see p. 733, *post*.
(3) For form CCC, see p. 734, *post*.

2. If such Justice is of opinion that the assault or battery complained of 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. R.S.C., c. 178, s. 73.

865. Dismissal of complaint for assault.—If the Justice, upon the hearing of any case of assault or battery upon the merits where the complaint is preferred by or on behalf of the person aggrieved, under the next preceding section, deems the offence not to be proved, or finds the assault or battery to have been justified, or so trifling as not to merit any punishment, and accordingly dismisses the complaint, he shall forthwith make out a certificate under his hand stating the fact of such dismissal, and shall deliver such certificate to the person against whom the complaint was preferred. R.S.C, c. 178, s. 74.

866. Release from further proceedings.— If the person against whom any such complaint has been preferred, by or on the behalf of the person aggrieved, obtains such certificate, or, having been convicted, pays the whole amount adjudged to be paid or suffers the imprisonment or imprisonment with hard labour, awarded, he shall be released from all further or other proceedings, civil or criminal, *for the same cause.* R.S.C., c. 178, s. 75.

See comments and authorities at pp. 183, 184, 596, 597, and under Articles 797-799, at p. 688; and see form of plea at p. 600. *ante.*

In R. v. Miles, already cited at p. 597, *ante*, a case was stated for the consideration of the Court for Crown Cases Reserved. The defendant had been convicted at the Central Criminal Court upon an indictment charging him (in the first count) with unlawfully and maliciously wounding the prosecutor; (in the second count) with unlawfully and maliciously inflicting grievous bodily harm; (in the third count) with causing actual bodily harm to the prosecutor; and (in the fourth count) with common assault. The defendant pleaded and pointed out at the trial the following conviction in respect of this same assault before a Court of Summary Jurisdiction: 'G. J. Miles, hereinafter called the defendant, is this day convicted for that he . . . did unlawfully assault and beat one Chubs Living, and the Court being of opinion that the said offence was of so trifling a nature that it is inexpedient to inflict any other than a nominal punishment, and the defendant, having given security to the satisfaction of the Court to be of good behaviour, is discharged.' The question for the opinion of the Court was whether the above summary conviction was a bar to the proceedings against him at the Central Criminal Court for the same offence. Poland, Q. C., and Warburton, for the defendant, said: "Express power is given by the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s 16, subsec 2, to Justices, upon convicting a person of assault, to discharge him conditionally on his giving security to be of good behaviour; and the provisions in 24 & 25 Vict., c. 100, s. 45, must now be read with the section above referred to. Moreover, apart from statutes, the summary conviction formed a bar at common law to the present indictment." Lockwood, Q.C., and Besley, for the prosecution, said: "The 24 & 25 Vict. c. 100, s. 45, only operates as a bar where a defendant shall have paid the whole amount adjudged or shall have suffered the imprisonment awarded;' but the Court neither fined nor imprisoned the defendant. The proceedings under

the Summary Jurisdiction Act 1889, did not bring the case within section 45 of the earlier statute." *Cur. adv. vult.* The Court (Lord Coleridge, C. J., Pollock, B. Hawkins, J., Charles, J., and Grantham, J.), upon the above facts, held that the summary conviction was a good answer at common law to the indictment, apart altogether from the question whether the defendant was entitled to the protection afforded by 24 & 25 Vict. c. 100, s. 45: and quashed the Conviction. (1)

867. **Costs on conviction or order.**—In every case of a summary conviction, or of an order made by a Justice, such Justice may, in his discretion, award and order, in and by the conviction or order, that the defendant shall pay to the prosecutor or complainant such costs as to the said Justice seem reasonable in that behalf, and not inconsistent with the fees established by law to be taken on proceedings had by and before Justices. R.S.C., c. 178, s. 59.

868. **Costs on dismissal.**—Whenever the Justice, instead of convicting or making an order, dismisses the information or 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.

871. **Fees.**—The fees mentioned in the following tariff and on others shall be and constitute the fees to be taken on proceedings before Justices in proceedings under this part:—

Fees to be taken by Justices of the Peace or their Clerks.

	$ cts.
1. Information or complaint and warrant or summons	0 50
2. Warrant where summons issued in first instance	0 10
3. Each necessary copy of summons or warrant	0 10
4. Each summons or warrant to or for a witness or witnesses. (Only one summons on each side to be charged for in each case, which may contain any number of names. If the Justice of the case requires it, additional summonses shall be issued without charge)	0 10
5. Information for warrant for witness and warrant	0 50

(1) R. v. Miles, 13 L. N. 79; 24 Q. B. D. 423; 59 L. J. (M. C.) 56. See other cases cit. at p. 597.

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.

1. Arrest of each individual upon a warrant.....	1 00
2. Serving summons.....	0 25
3. Mileage to serve summons or warrant, per mile (one way) necessarily travelled.....	0 10
4. Same mileage when service cannot be effected, but only upon proof of due diligence.	
5. Mileage taking prisoner to gaol, exclusive of disbursements necessarily expended in his conveyance.....	0 10
7. Attending Justices on trial in one or more cases, per hour.	0 25
8. Mileage travelled to attend trial (when public conveyence can be taken only reasonable disbursements to be allowed) one way per mile.....	0 10
9. Serving warrant of distress and returning same.....	1 00
10. Advertising under warrant of distress.....	1 00
11. Travelling to make distress, or, to search for goods to make distress when no goods are found, (one way) per mile..	0 10
12. Appraisements, whether by one appraiser or more, 2 cents in the dollar on the value of the goods.	
13. Commission on sale and delivery of goods, 5 cents in the dollar on the net produce of the goods. 52 V., c. 45, s. 2 and Sch.	

Witnesses' Fees.

1. Each day attending trial.....	0 75
2. Mileage travelled to attend trial (one way) per mile.....	0 10

872. Provisions respecting convictions.—Whenever a conviction adjudges a pecuniary penalty or compensation to be paid, or an order requires the payment of a sum of money, whether the Act or law authorizing such conviction or order does or does not provide a mode of raising or levying the penalty, compensation or sum of money, or of enforcing the payment thereof, the justice by his conviction, or order after adjudging payment of such penalty, compensation or sum of money, with or without costs, may order and adjudge—

(*a.*) that in default of payment thereof forthwith, or within a limited time, such penalty, compensation or sum of money shall be levied by distress and sale of the goods and chattels of the defendant, and, if sufficient distress cannot be found, that the defendant be imprisoned in the 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

(*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 common gaol or other prison of the said territorial division in the manner and for the time mentioned in the said Act or law, or for any period not exceeding three months, if the Act or law authorizing the conviction or order does not specify imprisonment, or does not specify any term of imprisonment, unless the said sums with the like costs and expenses are sooner paid.

2. The Justice making the conviction or order mentioned in the paragraph lettered (*a*) of subsection one of this section may issue a warrant of distress in the form DDD or EEE, as the case requires; (1), and the case of a conviction or order under the paragraph lettered (*b*) of the said subsection, a warrant in one of the forms FFF or GGG (2) 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, (3) the Justice may issue a warrant of commitment in the form JJJ. (4)

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 de-

(1) For forms DDD, and EEE, see pp 734 and 735, *post.*
(2) For forms FFF, and GGG, see pp. 736 and 737, *post.*
(3) For Form III, see p. 738, *post.*
(4) For Form JJJ, see p. 739, *post.*

fault 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.

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 ; (1), and, in default of distress, a warrant of commitment in the form LLL may issue. (2) Provided that the term of imprisonment in such case shall not exceed one month. R.S.C., c. 178, s. 70.

874. Endorsement of warrant of distress.—If, after delivery of any warrant of distress issued under this part to the constable or constables to whom the same has been directed to be executed, sufficient distress cannot be found within the limits of the jurisdiction of the Justice granting the warrant, then upon proof being made upon oath or affirmation of the handwriting of the justice granting the warrant, before any Justice of any other territorial division, such justice shall thereupon make an endorsement on the warrant, signed with his hand, authorizing the execution of the warrant within the limits of his jurisdiction, by virtue of which warrant and endorsement the penalty or sum and costs, or so much thereof as has not been before levied or paid, shall be levied by the person bringing the warrant, or by the person or persons to whom the warrant was originally directed, or by any constable or other peace officer of the last mentioned territorial division, by distress and sale of the goods and chattels of the defendant therein.

2. Such endorsement shall be in the form HHH in schedule one to this Act. (3) R.S.C., c. 178, s. 63.

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.

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(1) For Form KKK, see p. 740, *post.*
(2) For Form LLL, see p. 741, *post.*
(3) For Form HHH, see p. 738, *post.*

876. Remand of defendant when distress is ordered.—Whenever a Justice issues a warrant of distress as hereinbefore provided, he may suffer the defendant to go at large, or verbally, or by a written warrant in that behalf, may order the defendant to be kept and detained in safe custody, until return has been made to the warrant of distress, unless the defendant gives sufficient security, by recognizance or otherwise, to the satisfaction of the Justice, for his appearance at the time and place appointed for the return of the warrant of distress, before him or before such other Justice for the same territorial division as shall then be there. R.S.C., c. 178, s. 65.

877. Cumulative punishment.—Whenever a justice, upon any information or complaint, adjudges the defendant to be imprisoned and the defendant is then in prison undergoing imprisonment upon conviction for any other offence, the warrant of commitment for the subsequent offence shall be forthwith delivered to the gaoler or other officer to whom it is directed; and the justice who issued the same, if he thinks fit, may award and order therein that the imprisonment for the subsequent offence shall commence at the expiration of the imprisonment to which the defendant was previously sentenced. R.S.C., c. 178, s. 69.

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 cerified upon the back of the recognizance the non-appearance of the defendant, may transmit such recognizance to the proper officer in the province appointed by law to receive the same, to be proceeded upon in like manner as other recognizances; and such certificate shall be *primâ facie* evidence of the non-appearance of the said defendant.

2. Such certificate shall be in the form MMM in schedule one to this Act. (1) 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, except in the district of Nipissing as to which district the proper officer shall be the Clerk of the Peace for the county of Renfrew; 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; and in the other provinces of Canada, the proper officer to whom any such recognizance and certificate shall be transmitted, 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

(1) For form MMM, see p. 741, *post*.

collected in the same manner as like recognizances have heretofore been enforced and collected. R.S.C., c. 178, ss. 71 and 72.

879. Appeal.—Unless it is otherwise provided in any special Act under which a conviction takes place or an order is made by a Justice for the payment of money or dismissing an information or complaint, any person who thinks himself aggrieved by any such conviction or order, the prosecutor or complainant, as well as the defendant, may appeal, in the province of Ontario, to the Court of General Sessions of the Peace; in the province of Quebec, to the Court of Queen's Bench, Crown side; in the provinces of Nova Scotia, New-Brunswick and Manitoba, to the county Court of the district or county where the cause of the information or complaint arose; in the province of Prince Edward Island, to the Supreme Court; in the province of British Columbia, to the county or district Court, at the sitting thereof which shall be held nearest to the place where the cause of the information or complaint arose; and in the North-West Territories, to a judge of the Supreme Court of the said territories, sitting without a Jury; at the place where the cause of the information or complaint arose, or the nearest place thereto where a court is appointed to be held.

2. In the district of Nipissing such person may appeal to the Court of General Sessions of the Peace for the county of Renfrew. 51 V., c. 45, s. 7; 52 V., c. 45, s. 6.

880. Certificate of Appeal.—Every right of appeal shall, unless it is otherwise provided in any special Act, be subject to the conditions following, that is to say:—

(*a.*) If the conviction or order is made more than fourteen days before the sittings of the Court to which the appeal is given, such appeal shall be made to the then next sittings of such Court; but if the conviction or order is made within fourteen days of the sittings of such Court, then to the second sittings next after such conviction or order;

(*b.*) The appellant shall give to the respondent, or to the Justice who tried the case for him, a notice in writing, in the form NNN in schedule one to this Act, (1) 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 (2) 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

(1) For Form NNN, see p. 742, *post.*
(2) For Form OOO, see p. 742, *post.*

(although the order directs imprisonment in default of payment), instead of remaining in custody as aforesaid, or giving such recognizance as aforesaid, may deposit with the Justice convicting or making the order such sum of money as such Justice deems sufficient to cover the sum so adjudged to be paid, together with the costs of the conviction or order, and the costs of the appeal; and upon such recognizance being given, or such deposit being made, the Justice before whom such recognizance is entered into, or deposit made, shall liberate such person, if in custody;

(*d.*) In case of an appeal from the order of a Justice, pursuant to section five hundred and seventy-one, for the restoration of gold or gold-bearing quartz, or silver, or silver ore, the appellant shall give security by recognizance to the value of the said property to prosecute his appeal at the next sittings of the court and to pay such costs as are awarded against him;

(*e.*) The Court to which such appeal is made shall thereupon hear and determine the matter of appeal and make such order therein, with or without costs to either party, including costs of the court below, as seems meet to the court,—and, in case of the dismissal of an appeal by the defendant and the affirmance of the conviction or order, shall order and adjudge the appellant to be punished according to the conviction or to pay the amount adjudged by the said order, and to pay such costs as are awarded,—and shall, if necessary issue process for enforcing the judgment of the court; and whenever, after any such deposit has been made as aforesaid, the conviction or order is affirmed, the Court may order the sum thereby adjudged to be paid, together with the costs of the conviction or order, and the costs of the appeal, to be paid out of the money deposited, and the residue, if any, to be repaid to the appellant; and whenever, after any such deposit, the conviction or order is quashed, the Court shall order the money to be repaid to the appellant;

(*f*). The said Court shall have power, if necessary, from time to time, by order endorsed on the conviction or order, to adjourn the hearing of the appeal from one sittings to another, or others, of the said Court;

(*g.*) Whenever any conviction or order is quashed on appeal, as aforesaid, the Clerk of the Peace or other proper officer shall forthwith endorse, on the conviction or order, a memorandum that the same has been quashed; and whenever any copy or certificate of such conviction or order is made, a copy of such memorandum shall be added thereto, and shall, when certified under the hand of the Clerk of the Peace, or of the proper officer having the custody of the same, be sufficient evidence, in all courts and for all purposes, that the conviction or order has been quashed. 51 V., c. 45, s. 8; 53 V., c. 37, s. 24.

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.

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 notwitstanding it was shown to such Justice that by such variance the person summoned and appearing or apprehended had been deceived or misled, such Justice refused to adjourn the hearing of the case to some further day, as herein provided. R.S.C., c. 178, s. 79.

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.

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, 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.

885. Proceedings when appeal fails.—If an appeal against a conviction or order is decided in favour of the respondents, the Justice who made the conviction or order, or any other Justice for the same territorial division, may issue the warrant of distress or commitment for execution of the same, as if no appeal had been brought. R.S.C., c. 178, s. 82.

886. Conviction not to be quashed for defects of form.—No conviction or order affirmed, or affirmed and amended, in appeal, shall be quashed for want of form, or be removed by *certiorari* into any Superior Court, and no warrant or commitment shall be held void by reason of any defect therein, provided it is therein alleged that the defendant has been convicted, and there is a good and valid conviction to sustain the same. R.S.C., c. 178; s. 83.

887. Certiorari not to lie when appeal is taken.—No writ of *certiorari* shall be allowed to remove any conviction or order had or made before any Justice of the Peace if the defendant has appealed from such conviction or order to any Court to which an appeal from such conviction or order is authorized by law, or shall be allowed to remove any conviction or order made upon such appeal. R.S.C. c. 178, s. 84.

888. Conviction to be transmitted to Appeal Court. — Every Justice before whom any person is summarily tried, shall transmit the conviction or order to the Court to which the appeal is herein given, in and for the district, county or place wherein the offence is alleged to have been committed, before the time when an appeal from such conviction or order may be heard, there to be kept by the proper officer among the records of the Court; and if such conviction or order has been appealed against, and a deposit of money made, such Justice shall return the deposit into the said Court; and the conviction or order shall be presumed not to have been appealed against, until the contrary is shown.

2. Upon any indictment or information against any person for a subsequent offence, a copy of such conviction, certified by the proper officer of the Court, or proved to be a true copy, shall be sufficient evidence to prove a conviction for the former offence. R.S.C., c. 178, s. 86; 51 V., c. 45, s. 9.

889. Conviction not to be held invalid for irregularity.—No conviction or order made by any Justice of the peace and no warrant for enforcing the same, shall, on being removed by *certiorari* be held invalid for any irregularity, informality or insufficiency therein,

provided that the Court or Judge before which or whom the question is raised is, upon perusal of the depositions, satisfied that an offence of the nature described in the conviction, order or warrant, has been committed, over which such Justice has jurisdiction, and that the punishment imposed is not in excess of that which might have been lawfully imposed for the said offence; and any statement which, under this Act or otherwise, would be sufficient if contained in a conviction, shall also be sufficient if contained in an information, summons, order or warrant: Provided that the Court or Judge, where so satisfied as aforesaid, shall, even if the punishment imposed or the order made is in excess of that which might lawfully have been imposed or made, have the like powers in all respects to deal with the case as seems just as are by section eight hundred and eighty-three conferred upon the Court to which an appeal is taken under the provisions of section eight hundred and seventy-nine. R.S.C., c. 178, s. 87; 53 V, c. 37, s. 27.

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.—The Court having authority to quash any conviction, order or other proceeding by or before a Justice may prescribe by general order that no motion to quash any conviction, order or other proceeding by or before a Justice and brought before such Court by *certiorari*, shall be entertained unless the defendant is shown to have entered into a recognizance with one or more sufficient sureties, before a Justice or

Justices of the county or place within which such conviction or order has been made, or before a Judge or other officer, as may be prescribed by such general order, or to have made a deposit to be prescribed in like manner, with a condition to prosecute such writ of *certiorari* at his own costs and charges, with effect, without any wilful or affected delay, and, if ordered so to do, to pay the person in whose favour the conviction, order or other proceeding is affirmed, his full costs and charges to be taxed according to the course of the Court where such conviction, order or proceeding is affirmed. R.S.C., c. 178, s. 90.

893. Imperial Act superseded.—The second section of the Act of the Parliament of the United Kingdom, passed in the fifth year of the reign of His Majesty King George the Second, and chaptered nineteen, shall no longer apply to any conviction, order or other proceeding by or before a Justice in Canada, but the next preceding section of this Act shall be substituted therefor, and the like proceedings may be had for enforcing the condition of a recognizance taken under the said section as might be had for enforcing the condition of a recognizance taken under the said Act of the Parliament of the United Kingdom. R.S.C., c. 178, s. 91.

894. Judicial Notice of Proclamation.—No order, conviction or other proceeding shall be quashed or set aside, and no defendant shall be discharged, by reason of any objection that evidence has not been given of a proclamation or order of the Governor in Council, or of any rules, regulations, or by-laws made by the Governor in Council in pursuance of a statute of Canada, or of the publication of such proclamation, order, rules, regulations or by-laws in the *Canada Gazette*: but such proclamation, order, rules, regulations and by-laws and the publication thereof shall be judicially noticed. 51 V., c. 45, s. 10.

895. Refusal to quash.—If a motion or rule to quash a conviction, order or other proceeding is refused or discharged, it shall not be necessary to issue a writ of *procedendo*, but the order of the Court refusing or discharging the application shall be a sufficient authority for the registrar or other officer of the Court forthwith to return the conviction, order and proceedings to the Court or Justice from which or whom they were removed, and for proceedings to be taken thereon for the enforcement thereof, as if a *procedendo* had issued, which shall forthwith be done. R.S.C., c. 178, s. 93.

896. Conviction not to be set aside in certain cases.—Whenever it appears by the conviction that the defendant has appeared and pleaded, and the merits have been tried, and the defendant has not appealed against the conviction, where an appeal is allowed, or if appealed against, the conviction has been affirmed, such conviction shall not afterwards be set aside or vacated in consequence of any defect of form whatever, but the construction shall be such a fair and liberal construction as will be agreeable to the justice of the case. R.S.C., c. 178, s. 94.

897. Order as to costs.—If upon any appeal, the Court trying the appeal orders either party to pay costs, the order shall direct the costs to be paid to the Clerk of the Peace or other proper officer of the Court, to be paid over by him to the person entitled to the same, and shall state within what time the costs shall be paid. R.S.C., c. 178, s. 95.

898. Recovery of costs.—If such costs are not paid within the time so limited, and the person ordered to pay the same has not been bound by any recognizance conditioned to pay such costs, the Clerk of the Peace or his deputy, on application of the person entitled to the costs, or of any person on his behalf, and on payment of any fee to which he is entitled, shall grant to the person so applying, a certificate that the costs have not been paid; and upon production of the certificate to any Justice in and for the same territorial division, such Justice may enforce the payment of the costs by warrant of distress in manner aforesaid, and in defaul 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. (1) R.S.C., c. 178, s, 96.

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.

900. Statement of case by Justice for Review.—In this section the expression "the Court" means and includes any Superior Court of criminal jurisdiction for the province in which the proceedings herein referred to are carried on.

2. Any person aggrieved, the prosecutor or complainant as well as the defendant, who desires to question a conviction, order, determination or other proceeding of a Justice under this part, on the ground that it is erroneous in point of law, or is in excess of jurisdiction, may apply to such Justice to state and sign a case setting forth the facts of the case and the grounds on which the proceeding is questioned, and if the Justice declines to state the case, may apply to the Court for an order requiring the case to be stated.

3. The application shall be made and the case stated within such time and in such manner as is, from time to time, directed by rules or orders under section five hundred and thirty-three of this Act.

(1) For forms PPP, QQQ, and RRR, see pp 743, 744, and 745, *post*.

4. The appellant at the time of making such application, and before a case is stated and delivered to him by the Justice, shall in every instance, enter into a recognizance before such Justice or any other Justice exercising the same jurisdiction, with or without surety or sureties, and in such sum as to the Justice seems meet, conditioned to prosecute his appeal without delay, and to submit to the judgment of the Court and pay such costs as are awarded by the same ; and the appellant shall, at the same time, and before he shall be entitled to have the case delivered to him, pay to the Justice such fees as he is entitled to ; and the appellant, if then in custody, shall be liberated upon the recognizance being further conditioned for his appearance before the same Justice, or such other Justice as is then sitting, within ten days after the judgment of the Court has been given, to abide such judgment, unless the judgment appealed against is reversed.

5. If the Justice is of opinion that the application is merely frivolous, but not otherwise, he may refuse to state a case, and shall on the request of the applicant sign and deliver to him a certificate of such refusal ; provided that the Justice shall not refuse to state a case where the application for that purpose is made to him by or under the direction of Her Majesty's Attorney-General of Canada, or of any province.

6. Where the Justice refuses to state a case, it shall be lawful for the appellant to apply to the Court, upon an affidavit of the facts, for a rule calling upon the Justice, and also upon the respondent, to show cause why such case should not be stated ; and such Court may make such rule absolute, or discharge the application, with or without payment of costs, as to the Court seems meet ; and the Justice upon being served with such rule absolute, shall state a case accordingly, upon the appellant entering into such recognizance as hereinbefore provided.

7. The Court to which a case is transmitted under the foregoing provisions shall hear and determine the question or questions of law arising thereon, and shall thereupon affirm, reverse or modify the conviction, order or determination in respect of which the case has been stated, or remit the matter to the Justice with the opinion of the Court thereon, and may make such other order in relation to the matter and such orders as to costs, as to the Court seems fit ; and all such orders shall be final and 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 determination which has been affirmed, amended or made by such Court as the Justice who originally decided the case would have had to enforce his determination if the same had not been appealed against; and no action or proceeding shall be commenced or had against a Justice for enforcing such conviction, order or determination by reason of any defect in the same.

11. If the Court deems it necessary or expedient any order of the Court may be enforced by its own process.

12. No writ of *certiorari* or other writ shall be required for the removal of any conviction, order or other determination in relation to which a case is stated under this section or otherwise, for obtaining the judgment or determination of a Superior Court on such case under this section.

13. In all cases where the conditions, or any of them, in any recognizance entered into in pursuance of this section have not been complied with, such recognizance shall be dealt with in like manner as is provided by section eight hundred and seventy-eight with respect to recognizances entered into thereunder.

14. Any person who appeals under the provisions of this section against any determination of a Justice from which he is entitled to an appeal under section eight hundred and seventy-nine of this Act, shall be taken to have abandoned such last mentioned right of appeal finally and conclusively and to all intents and purposes.

15. Where, by any special Act, it is provided that there shall be no appeal from any conviction or order, no proceedings shall be taken under this section in any case to which such provision in such special Act applies. 53 V., c. 37, s. 28.

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. (1)

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 Her Majesty, for the public uses of Canada.

903. **Publication, &c., of returns.**—The Clerk of the Peace of the district or county in which any such returns are made, or the proper officer, other than the Clerk of the Peace, to whom such returns are made, shall, within seven days after the adjournment of the next ensuing General or Quarter Sessions, or of the term or sitting of such other Court as aforesaid, cause the said returns to be posted up in the court-house of the district or county, and also in a conspicuous place in the office of such Clerk of the Peace, or other proper officer, for

(1) For form SSS, see p. 746, *post*.

public inspection, and the same shall continue to be so posted up and exhibited until the end of the next ensuing General or Quarter Sessions of the Peace, or of the term or sitting of such other Court as aforesaid ; and for every schedule so made and exhibited by such Clerk or Officer, he shall be allowed such fee as is fixed by competent authority. R.S.C., c. 178, s. 103.

2. Such Clerk of the Peace or other officer of each district or county, within twenty days after the end of each General or Quarter Sessions of the Peace, or the sitting of such Court as aforesaid, shall transmit to the Minister of Finance and Receiver General a true copy of all such returns made within his district or county. R.S.C., c. 178, s. 104.

904. **Prosecutions for penalties under the preceding section.**—All actions for penalties arising under the provisions of section nine hundred and two shall be commenced within six months next after the cause of action accrues, and the same shall be tried in the district, county or place wherein such penalties have been incurred ; and if a verdict or judgment passes for the defendant, or the plaintiff becomes non-suit, or discontinues the action after issue joined, or if, upon demurrer or otherwise, judgment is given against the plaintiff, the defendant shall, in the discretion of the Court, recover his costs of suit, as between solicitor and client, and shall have the like remedy for the same as any defendant has by law in other cases. R.S.C., c. 178, s. 102.

905. **Remedies saved.**—Nothing in the three sections next preceding shall have the effect of preventing any person aggrieved from prosecuting, by indictment, any Justice, for any offence, the commission of which would subject him to indictment at the time of the coming into force of this Act. R.S.C., c. 178, s. 105.

906. **Defective returns.**—No return purporting to be made by any justice under this Act shall be vitiated by the fact of its including, by mistake, any convictions or orders had or made before him in any matter over which any Provincial Legislature has exclusive jurisdiction, or with respect to which he acted under the authority of any provincial law. R.S.C., c. 178, s. 106.

907. **Certain defects not to vitiate proceedings.**— No information, summons, conviction, order or other proceeding shall be held to charge two offences, or shall be held to be uncertain on account of its stating the offence to have been committed in different modes, or in respect of one or other of several articles, either conjunctively or disjunctively, for example, in charging an offence under section five hundred and eight of this Act it may be alleged that "the defendant unlawfully did cut, break, root up and otherwise destroy or damage a tree, sapling or shrub" ; and it shall not be necessary to define more particularly the nature of the act done, or to state whether such act was done in respect of a tree, or a sapling, or a shrub. R.S.C., c. 178, s. 107.

908. Preserving order in Court.—Every Judge of Sessions of the Peace, Chairman of the Court of General Sessions of the Peace, Police Magistrate, District Magistrate or Stipendiary Magistrate, shall have such and like powers and authority to preserve order in the said Courts during the holding thereof, and by the like ways and means as now by law are or may be exercised and used in like cases and for the like purposes by any Court in Canada, or by the judges thereof, during the sittings thereof. R.S.C., c. 178, s. 109.

909. Resistance to execution of process.—(*Amended by* 56 *Vic., c.* 32.) Every Judge of the Sessions of the Peace, Chairman of the Court of General Sessions of the Peace. Recorder, Police Magistrate, District Magistrate or Stipendiary Magistrate, whenever any resistance is offered to the execution of any summons, warrant of execution or other process issued by him, may enforce the due execution of the same by the means provided by the law for enforcing the execution of the process of other courts in like cases. R.S.C., c. 178, s. 110.

FORMS UNDER PART LVIII.

FROM SCHEDULE ONE.

VV.—(*Section* 859.)

CONVICTION FOR A PENALTY TO BE LEVIED BY DISTRESS AND IN DEFAULT OF SUFFICIENT DISTRESS, BY IMPRISONMENT.

Canada,
Province of ,
County of ,

Be it remembered that on the day of , in the year , at , in the said county, A. B. is convicted before the undersigned, , a Justice of the Peace for the said county, for that the said A. B. (*&c., stating the offence, and the time and place when and where committed*), and I adjudge the said A. B. for his said offence to forfeit and pay the sum of $ (*stating the penalty, and also the compensation, if any*), to be paid and applied according to law. and also to pay to the said C. D. the sum of , for his costs in this behalf; and if the said several sums are not paid forthwith, (*or* on or before the of next), * I order that the same be levied by distress and sale of the goods and chattels of the said A. B,, and in default of sufficient distress, * I adjudge the said A. B. to be imprisoned in the common gaol of the said county, at , in the said county of , (there to be kept at hard labour, *if such is the sentence*) for the term of , unless the said several sums and all costs and charges of the said distress (and of

the commitment and conveying of the said A. B. to the said gaol) are sooner paid.

Given under my hand and seal, the day and year first above mentioned, at , in the county aforesaid.

J. S., [SEAL.]
J. P., (*Name of county.*)

* *Or when the issuing of a distress warrant would be ruinous to the defendant and his family, or it appears he has no goods whereon to levy a distress, then instead of the words between the asterisks* * * *say*, "inasmuch as it is now made to appear to me that the issuing of a warrant of distress in this behalf would be ruinous to the said A. B. and his family," (*or*, "that the said A. B. has no goods or chattels whereon to levy the said sums by distress").

WW.—(*Section* 859.)

CONVICTION FOR A PENALTY, AND IN DEFAULT OF PAYMENT IMPRISONMENT.

Canada,)
Province of)
County of)

Be it remembered that on the day of in the year , at , in the said county, A. B. is convicted before the undersigned, , a Justice of the Peace for the said county for that he the said A. B. (*&c., stating the offence, and the time and place when and where it was committed*), and I adjudge the said A. B. for his said offence to forfeit and pay the sum of (*stating the penalty and the compensation, if any*) to be paid and applied according to law; and also to pay to the said C. D. the sum of for his costs in this behalf; and if the said several sums are not paid forthwith (*or*, on or before next), I adjudge the said A. B. to be imprisoned in the common gaol of the said county, at in the said county of (and there to be kept at hard labour) for the term of , unless the said sums and the costs and charges of conveying the said A. B. to the said common gaol are sooner paid.

Given under my hand and seal, the day and year first above mentioned at , in the county aforesaid.

J. S., [SEAL.]
J. P., (*Name of county.*)

XX.—(*Section* 859.)

CONVICTION WHEN THE PUNISHMENT IS BY IMPRISONMENT, ETC.

Canada,
Province of ,
County of .

Be it remembered that on the day of , in the year , at , in the said county, A. B. is convicted before the undersigned, , a Justice of the Peace in and for the said county, for that he the said A. B. (*&c., stating the offence, and the time and place when and where it was committed*) ; and I adjudge the said A. B. for his said offence to be imprisoned in the common gaol of the said county, at , in the county of , (and there to be kept at hard labour) for the term of ; and I also adjudge the said A. B. to pay to the said C. D. the sum of , for his costs in this behalf, and if the said sum for costs are not paid forthwith (*or* on or before next), then * I order that the said sum be levied by distress and sale of the goods and chattels of the said A. B. ; and in default of sufficient distress in that behalf, * I adjudge the said A. B. to be imprisoned in the said common gaol (and kept there at hard labour) for the term of , to commence at and from the term of his imprisonment aforesaid, unless the said sum for costs is sooner paid.

Given under my hand and seal, the day and year first above mentioned at , in the county aforesaid.

J. S. [SEAL.]

J. P., (*Name of county.*)

* *Or, when the issuing of a distress warrant would be ruinous to the defendant and his family, or it appears 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").

YY.—(*Section* 859).

ORDER FOR PAYMENT OF MONEY TO BE LEVIED BY DISTRESS AND IN DEFAULT OF DISTRESS IMPRISONMENT.

Canada,
Province of ,
County of .

Be it remembered that on , complaint was made before the undersigned, , a Justice of the Peace in and for the

said county of , for that (*stating the facts entitling the complainant to the order, with the time and place when and where they occurred*), and now at this day, to wit, on , at , the parties aforesaid appear before me the said Justice (*or* the said C. D. appears before me the said justice, but the said A. B., although duly called, does not appear by himself, his counsel or attorney, and it is now satisfactorily proved to me on oath that the said A. B. was duly served with the summons in this behalf, which required him to be and appear here on this day before me or such Justice or Justices of the Peace for the county, as should now be here, to answer the said complaint, and to be further dealt with according to law); and now having heard the matter of the said complaint, I do adjudge the said A. B. to pay to the said C. D. the sum of forthwith (*or* on or before next, *or as the Act or law requires*), and also to pay to the said C. D. the sum of for his costs in this behalf; and if the said several sums are not paid forthwith (*or* on or before next), then, * I hereby order that the same be levied by distress and sale of the goods and chattels of the said A. B. and in default of sufficient distress in that behalf * I adjudge the said A. B. to be imprisoned in the common goal of the said county, at , in the said county of , (and there kept at hard labour) for the term of , unless the said several sums, and all costs and charges of the said distress (and the commitment and conveyance of the said A. B. to the said common goal) 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 ").

ZZ.—(*Section* 859.)

ORDER FOR PAYMENT OF MONEY, AND IN DEFAULT OF PAYMENT IMPRISONMENT.

Canada,
Province of ,
County of .

Be it remembered that on ; complaint was made before the undersigned, , a Justice of the Peace in and for the said county of , for that (*stating the facts entitling the*

complainant to the order, with the time and place when and where they occurred), and now on this day, to wit, on , at , the parties aforesaid appear before me the said Justice (*or* the said C. D. appears before me the said Justice, but the said A. B., although duly called, does not appear by himself, his counsel or attorney, and it is now satisfactorily proved to me upon oath that the said A. B. was duly served with the summons in this behalf, which required him to be and appear here this day before me, or such Justice or Justices of the Peace for the said county, as should now be here, to answer to the said complaint, and to be further dealt with according to law), and now having heard the matter of the said complaint, I do adjudge the said A. B. to pay to the said C.D. the sum of forthwith (*or* on or before next, *or as the Act or law requires*), and also to pay to the said C. D. the sum of for his costs in this behalf; and if the said several sums are not paid forthwith (*or* on or before next), then I adjudge the said A. B. to be imprisoned in the common gaol of the said county at , in the said county of , (there to be kept at hard labour *if the Act or law authorizes this*) for the term of unless the said several sums (and costs and charges of commitment and 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.*)

AAA.—(*Section* 859.)

ORDER FOR ANY OTHER MATTER WHERE THE DISOBEYING OF IT IS PUNISHABLE WITH IMPRISONMENT.

Canada,
Province of ,
County of .

Be it remembered that on , complaint was made before the undersigned, , a Justice of the Peace in and for the said county of , for that (*stating the facts entitling the complainant to the order with the time and place where and when they occurred*); and now on this day, to wit, on , at , the parties aforesaid appear before me the said Justice (*or* the said C. D. appears before me the said Justice, but the said A. B., although duly called, does not appear by himself, his counsel or attorney, and it is now satisfactorily proved to me, upon oath, that the said A. B. was duly served with the summons in this behalf, which required him to be and appear here this day before me, or such Justice or Justices of the Peace for the said county, as should now be here to answer to the said complaint and to be

further dealt with according to law; and now having heard the matter of the said complaint, I do adjudge the said A. B. to (*here state the matter required to be done*), and if, upon a copy of the minute of this order being served upon the said A. B., either personally or by leaving the same for him at his last or most usual place of abode, he neglects or refuses to obey the same, in that case I adjudge the said A. B., for such his disobedience, to be imprisoned in the common gaol of the said county, at , in the said county of , (there to be kept at hard labour, (*if the statute authorizes this*), for the term of unless the said order is sooner obeyed, and I do also adjudge the said A. B. to pay 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 in the said common gaol (there to be kept at hard labour) for the space of , to commence at and from the termination of his imprisonment aforesaid, unless the said sum for costs is sooner paid.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S. [SEAL.]

J. P., (*Name of county.*)

BBB.—(*Section* 862.)

FORM OF ORDER OF DISMISSAL OF AN INFORMATION OR COMPLAINT.

Canada, }
Province of , }
County of . }

Be it remembered that on , information was laid (*or* complaint was made) before the undersigned, a Justice of the Peace in and for the said county of , for that (*&c., as in the summons of the defendant*) and now at this day, to wit, on , at , (*if at any adjournment insert here:* "to which day the hearing of this case was duly adjourned, of which the said C D. had due notice,") both the said parties appear before me in order that I should hear and determine the said information (*or* complaint) (*or* the said A. B. appears before me, but the said C. D., although duly called, does not appear); [whereupon the matter of the said information (*or* complaint) being by me duly considered, it manifestly appears to me that the said information (*or* complaint) is not proved, and] (*if the informant or complainant does not appear, these words may be omitted,*) I do therefore dismiss the same, and do adjudge that the said C. D. do pay to the said A. B. the sum of , for his costs incurred by him in

defence in his behalf; and if the said sum for costs is not paid forthwith (*or* on or before), I order that the same be levied by distress and sale of the goods and chattels of the said C. D., and in default of sufficient distress in that behalf, I adjudge the said C. D. to be imprisoned in the common gaol of the said county of , at , in the said county of (and there kept at hard labour) for the term of , unless the said sum for costs, and all costs and charges of the said distress (and of the commitment and conveying of the said C. D. to the said common gaol) are sooner paid.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL].

J. P. (*Name of county.*)

CCC.—(*Section* 862.)

FORM OF CERTIFICATE OF DISMISSAL.

Canada,
Province of ,
County of .

I hereby certify that an information (*or* complaint) preferred by C. D. against A. B. for that (*&c., as in the summons*) was this day considered by me, a Justice of the Peace in and for the said county of , and was by me dismissed (with costs).

Dated at , this day of , in the year

J. S.,

J. P., (*Name of county.*)

DDD.—(*Section* 872.)

WARRANT OF DISTRESS UPON A CONVICTION FOR A PENALTY.

Canada,
Province of ,
County of ,

To all or any of the constables and other peace officers in the said county of

Whereas A. B., late of , (*labourer*), was on this day (*or* on last past) duly convicted before , a Justice of the Peace, in and for the said county of , for that (*stating the offence, as in the conviction*), and it was thereby adjudged that the said A. B. should for such his offence, forfeit and pay (*&c., as in the*

conviction), and should also pay to the said C. D. the sum of , for his costs in that behalf; and it was thereby ordered that if the said several sums were not paid (forthwith) the same should be levied by distress and sale of the goods and chattels of the said A. B., and it was thereby also adjudged that the said A. B., in default of sufficient distress, should be imprisoned in the common gaol of the said county, at , in the said county of (and there kept at hard labour) for the space of , unless the said several sums and all costs and charges of the said distress, and of the commitment and conveying of the said A. B. to the said common gaol were sooner paid; * And whereas the said A. B., being so convicted as aforesaid, and being (now) required to pay the said sums of and has not paid the same or any part thereof, but therein has made default: These are, therefore, to command you, in Her Majesty's name, forthwith to make distress of the goods and chattels of the said A. B.; and if within days next after the making of such distress, the said sums, together with the reasonable charges of taking and keeping the distress, are not paid, then to sell the said goods and chattels so by you distrained, and to pay the money arising from such sale unto me, the convicting Justice (*or* one of the convicting Justices), that I may pay and apply the same as by law directed, and may render the overplus, if any, on demand, to the said A. B.; and if no such distress is found, then to certify the same unto me, that such further proceedings may be had thereon as to law appertain.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

J. P., (*Name of county.*)

EEE.—(*Section* 872.)

WARRANT OF DISTRESS UPON AN ORDER FOR THE PAYMENT OF MONEY.

Canada
Province of , }
County of }

To all or any of the Peace Officers in the said county of .

Whereas on , last past, a complaint was made before , a Justice of the Peace in and for the said county, for that (*&c., as in the order*), and afterwards, to wit, on , at , the said parties appeared before (*as in the order*), and thereupon the matter of the said complaint having been considered, the said A. B. was adjudged to pay to the said C. D. the sum of , on or before then next, and also to pay 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 goal of the said county, at in the said county of (and there kept at hard labour) for the term of , unless the said several sums and all costs and charges of the distress (and of the commitment and conveying of the said A. B. to the said common gaol) were sooner paid; *And whereas the time in and by the said order appointed for the payment of the said several sums of , and has elapsed, but the said A. B. has not paid the same, or any part thereof, but therein has made default: These are, therefore, to command you, in Her Majesty's name, forthwith to make distress of the goods and chattels of the said A. B. and if within the space of days after the making of such distress, the said last mentioned sums, together with the reasonable charges of taking and keeping the said distress, are not paid, then to sell the said goods and chattels so by you distrained, and to pay the money arising from such sale unto me (*or some other of the convicting Justices, as the case may be*), that I (*or* he) may pay or apply the same as by law directed, and may render the overplus, if any, on demand to the said A. B.; and if no such distress can be found, then to certify the same unto me, to the end that such proceedings may be had therein, as to law appertain.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

J. P., (*Name of county.*)

FFF.—(*Section* 872.)

WARRANT OF COMMITMENT UPON A CONVICTION FOR A PENALTY IN THE FIRST INSTANCE.

Canada,
Province of ,
County of ,

To all or any of the constables and other Peace Officers in the said county of , and to the keeper of the common gaol of the said county of , at in the said county of .

Whereas A. B., late of , (*labourer*), was on this day convicted before the undersigned , a Justice of the Peace in and for the said county, for that (*stating the offence, as in the conviction*), and it was thereby adjudged that the said A. B., for his offence, should forfeit and pay the sum of (*&c., as in the conviction*), and should pay to the said C. D. the sum of , for his costs in that behalf; and it was thereby further adjudged

that if the said several sums were not paid (forthwith) the said A. B. should be imprisoned in the common gaol of the county, at , in the said county of (and there kept at hard labour) for the term of , unless the said several sums (and the costs and charges of conveying the said A. B. to the said common gaol) were sooner paid; And whereas the time in and by the said conviction appointed for the payment of the said several sums has elapsed, but the said A. B. has not paid the same, or any part thereof, but therein has made default: These are, therefore, to command you, the said Peace Officers, or any one of you, to take the said A. B., and him safely to convey to the common gaol at aforesaid, and there to deliver him to the said keeper thereof, together with this precept; And I do hereby command you, the said keeper of the said common gaol, to receive the said A. B. into your custody in the said common gaol, there to imprison him (and keep him at hard labour) for the term of , unless the said several sums (and costs and charges of carrying him to the said common gaol, amounting to the further sum of), are sooner paid unto you, the said keeper; and for your so doing, this shall be your sufficient warrant.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

J. P., (*Name of county.*)

GGG.—(*Section* 872.)

WARRANT OF COMMITMENT ON AN ORDER IN THE FIRST INSTANCE.

Canada, }
Province of , }
County of , }

To all or any of the Constables and other Peace Officers in the said county of , and to the keeper of the common gaol of the county of , at , in the said county of .

Whereas, on last past, complaint was made before the undersigned , a Justice of the Peace in and for the said county of , for that (*&c., as in the order*), and afterwards, to wit, on the day of , at A. B. and C. D. appeared before me, the said Justice (*or as it is in the order*), and thereupon having considered the matter of the complaint, I adjudged the said A. B. to pay the said C. D. the sum of , on or before the day of then next, and also to pay to the said C. D. the sum of , for his costs in that behalf; and I also thereby adjudged that if the said several sums were not paid on or before the day of then

next, the said A. B. should be imprisoned in the common gaol of the county of , at . in the said county of (and there be kept at hard labour) for the term of , unless the said several sums (and the costs and charges of conveying the said A. B. to the said common gaol, *as the case may be*) were sooner paid; And whereas the time in and by the said order appointed for the payment of the said several sums of money has elapsed, but the said A. B. has not paid the same, or any part thereof, but therein has made default: These are, therefore, to command you, the said Peace Officers, or any of you, to take the said A. B. and him safely to convey to the said common gaol, at aforesaid, and there to deliver him to the keeper thereof, together with this precept: And I do hereby command you, the said keeper of the said common gaol, to receive the said A. B. into your custody in the said common gaol, there to imprison him (and keep him at hard labour) for the term of , unless the said several sums (and the cost and charges of conveying him to the said common gaol, amounting to the further sum of), are sooner paid unto you the said keeper; and for your so doing, this shall be your sufficient warrant.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]
J. P., (*Name of county.*)

HHH.—(*Section* 874.)

ENDORSEMENT IN BACKING A WARRANT OF DISTRESS.

Canada, }
Province of , }
County of . }

Whereas proof upon oath has this day been made before me , a Justice of the Peace in and for the said county, that the name of J. S. to the within warrant subscribed is of the handwriting of the Justice of the Peace within mentioned, I do therefore authorize W. T., who brings me this warrant, and all other persons to whom this warrant was originally directed, or by whom the same may be lawfully executed, and also all Peace Officers in the said county of , to execute the same within the said county.

Given under my hand, this day of , one thousand eight hundred and

O. K.,
J. P., (*Name of county.*)

III.—(*Section* 872.)

CONSTABLE'S RETURN TO A WARRANT OF DISTRESS.

I. W. T., constable, of , in the county of , hereby certify to J. S., Esquire, a Justice of the Peace in and for the county

of , that by virtue of this warrant I have made diligent search for the goods and chattels of the within mentioned A. B., and that I can find no sufficient goods or chattels of the said A. B. whereon to levy the sums within mentioned.

Witness my hand, this day of , one thousand eight hundred and

W. T.

JJJ.—(*Section* 872.)

WARRANT OF COMMITMENT FOR WANT OF DISTRESS.

Canada,
Province of ,
County of ,

To all or any of the Constables and other Peace officers in the county of , and to the keeper of the common gaol of the said county of , at , in the said county.

Whereas (*&c., as in either of the foregoing distress warrants*, DDD or EEE, *to the asterisk,* and then thus*): And whereas, afterwards on the day of , in the year aforesaid, I, the said Justice, issued a warrant to all or any of the Peace Officers of the county of , commanding them, or any of them, to levy the said sums of and by distress and sale of the goods and chattels of the said A. B.; And whereas it appears to me, as well by the return of the said warrant of distress, by the Peace Officer who had the execution of the same, as otherwise, that the said Peace Officer has made diligent search for the goods and chattels of the said A. B., but that no sufficient distress whereon to levy the sums above mentioned could be found: These are, therefore, to command you, the said Peace Officers, or any one of you, to take the said A. B., and him safely to convey to the common gaol at aforesaid, and there deliver him to the said keeper, together with this precept: And I do hereby command you, the said keeper of the said common gaol, to receive the said A. B. into your custody, in the said common gaol, there to imprison him (and keep him at hard labour) for the term of , unless the said several sums, and all the costs and charges of the said distress (and of the commitment and conveying of the said A. B. to the said common gaol) amounting to the further sum of , are sooner paid unto you, the said keeper; and for so doing this shall be your sufficient warrant.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

J. P., (*Name of county.*)

KKK.—(*Section* 873.)

WARRANT OF DISTRESS FOR COSTS UPON AN ORDER FOR DISMISSAL OF AN INFORMATION OR COMPLAINT.

Canada,
Province of ,
District of .

To all or any of the Constables and other Peace Officers in the said county of

Whereas on last past, information was laid (*or* complaint was made) before a Justice of the Peace in and for the said county of , for that (*&c., as in the order of dismissal*) and afterwards, to wit, on , at , both parties appearing before , in order that (I) should hear and determine the same, and the several proofs adduced to (me) in that behalf, being by (me) duly heard and considered, and it manifestly appearing to (me) that the said information (*or* complaint) was not proved, (I) therefore dismissed the same and adjudged that the said C. D. should pay to the said A. B. the sum of , for his costs incurred by him in his defence in that behalf; and (I) ordered that if the said sum for costs was not paid (forthwith) the same should be levied on the goods and chattels of the said C. D., and (I) adjudged that in default of sufficient distress in that behalf the said C. D. should be imprisoned in the common gaol of the said county of , at , in the said county of (and there kept at hard labour) for the space of , unless the said sum for costs, and all costs and charges of the said distress, and of the commitment and conveying of the said A. B. to the said common gaol, were sooner paid; * And whereas the said C. D. being now required to pay to the said A. B. the said sum for costs, has not paid the same, or any part thereof, but therein has made default: These are, therefore, to command you, in Her Majesty's name, forthwith to make distress of the goods and chattels of the said C. D., and if within the term of days next after the making of such distress, the said last mentioned sum, together with the reasonable charges of taking and keeping the said distress, shall not be paid, then to sell the said goods and chattels so by you distrained, and to pay the money arising from such sale to (*me*) that (I), may pay and apply the same as by law directed, and may render the overplus (if any) on demand to the said C. D., and if no distress can be found, then to certify the same unto *me* (*or* to any other Justice of the Peace for the same county), that such proceedings may be had therein as to law appertain.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

J. P., (*Name of county.*)

LLL.—(*Section* 873.)

WARRANT OF COMMITMENT FOR WANT OF DISTRESS.

Canada,
Province of ,
County of .

To all or any of the Constables and other Peace Officers in the said county of , and to the keeper of the common gaol of the said county of , at , in the said county of .

Whereas (*&c., as in 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.*)

MMM.—(*Section* 878.)

CERTIFICATE OF NON-APPEARANCE TO BE ENDORSED ON THE DEFENDANT'S RECOGNIZANCE.

I hereby certify that the said A. B. has not appeared at the time and place in the said condition mentioned, but therein has made

default, by reason whereof the within written recognizance is forfeited.

J. S., [SEAL.]

J. P., (*Name of county.*)

NNN.—(*Section* 880.)

NOTICE OF APPEAL AGAINST A CONVICTION OR ORDER.

To C. D., of , and (*the names and additions of the parties to whom the notice of appeal is required to be given.*)

Take notice, that I, the undersigned, A. B. of intend to enter and prosecute an appeal at the next General Sessions of the Peace (*or other Court, as the case may be*) to be holden at , in and for the county of , against a certain conviction (*or* order) bearing date on or about the day of , instant, and made by (you) J. S., Esquire, a Justice of the Peace in and for the said county of , whereby I, the said A. B. was convicted of having (or was ordered) to pay , (*here state the offence as in the conviction, information, or summons, or the amount adjudged to be paid, as in the order, as correctly as possible*).

Dated at , this day of , one thousand eight hundred and .

A. B.

MEMORANDUM.—*If this notice is given by several defendants, or by an attorney, it may be adapted to the case*

OOO.—(*Section* 880.)

FORM OF RECOGNIZANCE TO TRY THE APPEAL.

Canada,
Province of ,
County of .

Be it remembered that on , A. B., of , (*labourer*), and L. M., of , (*grocer*), and N. O., of , (*yeoman*), personally came before the undersigned , a Justice of the Peace in and for the said county of , and severally acknowledged themselves to owe to our Sovereign Lady the Queen, the several sums following, that is to say, the said A. B. the sum of , and the said L. M. and N. O. the sum of , each, of good and lawful money of Canada, to be made and levied of their several goods and chattels, lands and tenements respectively, to the use of our said Lady the Queen, her heirs and successors, if he the said A. B. fails in the condition endorsed (*or* hereunder written).

Taken and acknowledged the day and year first above mentioned, at , before me.

J. S.,

J. P.. (Name of county.)

The condition of the within (*or* the above) written recognizance is such that if the said A. B. personally appears at the (next) General Sessions of the Peace (*or other Court discharging the functions of the Court of General Sessions, as the case may be*), to be holden at , on the day of , next, in and for the said county of , and tries an appeal against a certain conviction. bearing date the day of (*instant*), and made by (me) the said Justice, whereby he, the said, A. B., was convicted, for that he, the said A. B., did, on the day of , at , in the said county of , (*here set out the offence as stated in the conviction*) ; and also abides by the judgment of the Court upon such appeal, and pays such costs as are by the Court awarded, then the said recognizance to be void, otherwise to remain in full force and virtue.

FORM OF NOTICE OF SUCH RECOGNIZANCE TO BE GIVEN TO THE APPELLANT AND HIS SURETIES.

Take notice, that you, A. B., are bound in the sum of and you L. M. and N. O. in the sum of , each, that you, the said A. B. will personally appear at the next General Sessions of the Peace to be holden at , in an 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 (*or* ordered, &c.), (*stating offence or the subject of the order shortly*), and abide by the judgment of the court upon such appeal and pay such costs as are by the court awarded, and unless you the said A. B. personally appear and try such appeal and abide by such judgment and pay such costs accordingly, the recognizance entered into by you will forthwith be levied on you and each of you.

Dated at , this day of , one thousand eight hundred and

PPP.—(*Section* 898.)

CERTIFICATE OF CLERK OF THE PEACE THAT THE COSTS OF AN APPEAL ARE NOT PAID.

Office of the Clerk of the PEACE for the county of

Title of the Appeal.

I hereby certify that a Court of General Sessions of the Peace, (*or other Court discharging the functions of the Court of General Sessions, as*

the case may be), holden at , in and for the said county, on last past, an appeal by A. B. against a conviction (*or* order) of J. S., Esquire, a Justice of the Peace in and for the said county, came on to be tried, and was there heard and determined, and the said Court of General Sessions (*or other Court, as the case may be*) thereupon ordered that the said conviction (*or* order) should be confirmed (*or* quashed), and that the said (appellant) should pay to the said (respondent) the sum of , for his costs incurred by him in the said appeal, and which sum was thereby ordered to be paid to the Clerk of the Peace for the said county, on or before the day of (*instant*), to be by him handed over to the said (respondent), and I further certify that the said sum for costs has not, nor has any part thereof, been paid in obedience to the said order.

Dated at , this day of , one thousand eight hundred and

G. H.,
Clerk of the Peace.

QQQ.—(*Section* 898.)

WARRANT OF DISTRESS FOR COSTS OF AN APPEAL AGAINST A CONVICTION OR ORDER.

Canada,
Province of ,
County of .

To all or any of the constables and other peace officers in the said county of .

Whereas (*&c.. as in the warrants of distress, DDD or EEE, and to the end of the statement of the conviction or order, and then thus*): And whereas the said A. B. appealed to the Court of General Sessions of the Peace (*or other Court discharging the functions of the Court of General Sessions, as the case may be*), for the said county, against the said conviction or order, in which appeal the said A. B. was the appellant, and the said C. D. (*or* J. S, Esquire, the Justice of the Peace who made the said conviction *or* order) was the respondent, and which said appeal came on to be tried and was heard and determined at the last General Sessions of the Peace (*or other Court, as the case may be*) for the said county, holden at , on ; and the said Court thereupon ordered that the said conviction (*or* order) should be confirmed (*or* quashed) and that the said (appellant) should pay to the said (respondent) the sum of , for his costs incurred by him in the said appeal, which said sum was to be paid to the Clerk of the Peace for the said county, on or before the day of , one thousand eight hundred and , to be by him handed over to the said C. D.; and whereas the Clerk of the Peace of the said county has, on the day of

(*instant*), duly certified that the said sum for costs had not been paid: * These are, therefore, to command you, in Her Majesty's name, forthwith to make distress of the goods and chattels of the said A. B., and if, within the term of days next after the making of such distress, the said last mentioned sum, together with the reasonable charges of taking and keeping the said distress, are not paid, then to sell the said goods and chattels so by you distrained, and to pay the money arising from such sale to the Clerk of the Peace for the said county of , that he may pay and apply the same as by law directed; and if no such distress can be found, then to certify the same unto me or any other Justice of the Peace for the same county, that such proceedings may be had therein as to law appertain.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

O. K., [SEAL.]

J. P., (*Name of county.*)

RRR.—(*Section* 898.)

WARRANT OF COMMITMENT FOR WANT OF DISTRESS IN THE LAST CASE.

Canada,
Province of ,
County of .

To all or any of the constables and other peace officers in the said county of

Whereas (*&c., as in form QQQ, to the asterisk * and then thus*): And whereas, afterwards, on the day of , in the year aforesaid, I, the undersigned, issued a warrant to all or any of the Peace Officers in the said county of , commanding them, or any of them, to levy the said sum of , for costs, by distress and sale of the goods and chattels of the said A. B.; And whereas it appears to me, as well by the return to the said warrant of distress of the Peace Officer who was charged with the execution of the same, as otherwise, that the said Peace Officer has made diligent search for the goods and chattels of the said A. B., but that no sufficient distress whereon to levy the said sum above mentioned could be found: These are, therefore, to command you, the said Peace Officers, or any one of you, to take the said A. B., and him safely to convey to the common gaol of the said county of , at aforesaid, and there deliver him to the said keeper thereof, together with this precept: And I do hereby command you, the said keeper of the said common gaol, to receive the said A. B. into your custody in the said common gaol, there to imprison him (and keep him at hard labour) for the 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.*)

SSS.—(*Section* 902.)

RETURN of convictions made by me (*or* us, *as the case may be*), during the quarter ending , 18 .

Name of the Prosecutor.	Name of the Defendant	Nature of the Charge.	Date of Conviction.	Name of Convicting Justice	Amount of Penalty. Fine or Damage.	Time when paid or to be paid to the said Justice.	To whom paid over by the said Justice.	If not paid, why not, and general observations if any.

J. S., Convicting Justice,

or

J. S. and O. K., Convicting Justices (*as the case may be.*)

LIST OF OFFENCES TRIABLE SUMMARILY. (1)

ART.	OFFENCE.	PUNISHMENT.	TRIABLE BEFORE	LIMITATION.
	ANIMALS.			
512	Cruelty to.....	Penalty $50, or 3 months, with or without h.l. or both	Two Justices.	3 months (Art. 551e)
501	Injuries to animals (not being cattle) (2).....	Penalty $100 or 3 months with or without h. l.....	One Justice	Six months (3).
513	Keeping cock pit.....	Penalty $50, or 3 months, besides forfeiture	Two Justices...	3 months (Art. 551e)
307, 332	Killing dogs, birds, etc., with intent to steal the skin, plumage, etc.....	Penalty $20, (4) or *one month* with h.l 2nd *offence*, 3 months with h. l.....	One Justice....	Six months (3).
338	Killing or taking pigeons....	Penalty $10 (4).....	do	do
	ASSAULT.			
265	Common assault (5)	$ 0, fine or 2 mths impris'ment with or without h. l..	do	do
	BANK NOTES, ETC.			
442	Printing or using circulars or business cards in the likeness of.....	Fine, $100, or 3 mths, or both.....	Two Justices. .	do
	CATTLE.			
515	Refusing Peace Officer admission to cattle car, etc..	Penalty $20, or 30 days	One Justice	3 months (Art. 551e)
514	Violating provisions as to conveyance of cattle.....	Penalty $100.....	do	3 months (Art. 551e)
	COINAGE OFFENCES.			
464	Manufacturing or importing uncurrent copper coin...	Penalty $20 for every pound; besides forfeiture.	One Justice ...	Six months (3).
476	Uttering defaced coin.....	Penalty $10.....	Two Justices...	do
477	Uttering uncurrent copper coin.....	Penalty; double the nominal value of the coin or 8 days	One Justice....	do
	CRIMINAL BREACHES OF CONTRACT.			
521	By individuals (5).....	Fine $100 or 3 mths with or without h. l.	Two Justices...	do
521	By Municipal Corporations (5	Penalty $1000.....	do	do
521	By Railway Companies (5)....	Penalty $100.	do	do
522	Municipal Corporation or Company failing to post up the provisions of Article 521....	Penalty, $20 per day.	One Justice....	do

(1) With the exception of a few, which are specially noted as being either indictable or triable summarily, all the offences in this list are non-indictable.

(2) This offence is indictable, when committed after a previous conviction. (See p. 502, *ante*.)

(3) See Art. 841, *ante*, which (in all cases not otherwise limited) limits the time for the commencement of the prosecution of an offence, punishable on summary conviction to *six* months from the time when the matter of complaint or information arose, except in the North West Territories, where the limitation in such cases when not otherwise provided for, is *twelve* months.

(4) This is in addition to the value of the animal, bird or article in question.

(5) This may be prosecuted either by indictment or summarily.

LIST OF OFFENCES TRIABLE SUMMARILY.—*Continued.*

ART.	OFFENCE.	PUNISHMENT.	TRIABLE BEFORE	LIMITATION.
522	Injuring copy of provisions when posted up.....	Penalty $10.....	One Justice	Six months. (1)
	DANGEROUS WEAPONS.			
110	Carrying any bowie knife or other offensive weapon....	Penalty $50 (not less than $10). In default of payment 30 days with or without *h. l.*	Two Justices...	1 month (Art. 551 *f*).
103	Carrying any offensive weapon publicly.....	$40, fine. In default of payment, 30 days...	do	1 month (Art. 551 *f*).
105	Carrying a pistol or air-gun.	$25 fine (not less than $5), or one month.....	One Justice....	1 month (Art. 551 *f*).
111	Carrying sheath knives.....	$40 (not less than $10). In default 30 days with or without *h. l.*...	Two Justices...	1 month (Art. 551 *f*).
117	Concealing weapon in or about Public Works.	Penalty, $100 (not less than $40)....	One Justice....	Six months (1).
107	Having weapon when arrested.....	$50 fine or 3 months with or without h. l.....	Two Justices...	1 month (Art. 551*f*).
108	Having weapon with intent to injure any one.....	Penalty $200 (not less than $50), or 6 months with or without h. l.....	do	do
109	Pointing any fire arm at any one.....	$100 (*not less than* $10), or 30 days with or without h, l.	do	do
117	Possessing weapon near public works.....	Penalty, $4 each weapon	One Justice....	Six months (1).
116	Selling arms in N. W. T... ..	$200 fine or 6 months or both.....	Two Justices...	do
106	Selling pistol, etc., to a minor under 16	$50 fine.....	One Justice....	1 month (Art. 551*f*).
106	Selling pistol, etc., without keeping record.....	$25 fine.....	do	do
	DESERTERS.			
75	Enticing militia or mounted police men to desert.....	6 months, with or without h. l.....	do ...	Six months (1).
74	Resisting warrant for deserters	$80 penalty.....	Two Justices...	do
	DISORDERLY HOUSE..			
200	Wilfully preventing obstructing or delaying officer entering.....	Penalty $100, and 6 months, with or without h. l.....	do	do
	(See VAGRANCY.)			
	FIRE ARMS.			
	(See DANGEROUS WEAPONS.)			
	GAMBLING.			
199	Playing or looking on at play in a gaming house	Penalty $100 ; In default 2 months.	Two Justices...	do

(1) See Art. 841 *ante*, and see note (3) on p. 747, *ante*.

LIST OF OFFENCES TRIABLE SUMMARILY.—*Continued.*

ART.	OFFENCE.	PUNISHMENT.	TRIABLE BEFORE	LIMITATION.
200	Wilfully obstructing or delaying officer entering a gaming house, etc. (See VAGRANCY.)	Penalty $100 and 6 months, with or without h. l.	Two Justices	Six months. (3)
2035	Railway or Steamboat Company neglecting to post up in their conveyances the provisions of Art. 203 against gambling	Penalty $100; not less than $20.	Civil Court. (See Art. 929.)	do
2033	Railway or Steamboat officer neglecting to arrest persons gambling in their conveyances	Penalty $100; not less than $20.	One Justice	do
	INDECENT ACTS.			
177	In any place to which the public have access or in *any* place with intent to insult or offend any one	$50, fine, or six months, with or without h. l. or both	Two Justices	do
	INDIAN GRAVES.			
352	Stealing or Injuring things in	Penalty $100, or 3 months, 2*nd offence*, $100 and 6 months, h. l.	One Justice	do
	INTIMIDATION.			
523	By violence, picketing, &c. (1)	Fine, $100, or 3 months with or without h. l.	Two Justices	do
525	Of Wheat Dealers, Seamen, etc. (1)	Fine, $100, or 3 months with or without h. l.	do	do
	INTOXICATING LIQUORS.			
119	Conveying on board H. M's ships	$50 fine; 1 month in default.	do	do
118	Selling, near public works	1*st offence*: Penalty $40 and costs. In default, 3 months. *Every further offence*: same penalty; and imprisonment in default, together with a further imprisonment of 6 months	One Justice	do
	MARINE STORES.			
382	Buying marine stores from persons under sixteen	Penalty, $4. 2*nd offence*, $6	do	do
382	Receiving marine stores before sunrise or after sunset	Penalty, $5. 2*nd offence*, $7	do	do
	MISCHIEF.			
495	Fastening any vessel, etc., to a buoy, etc.	Penalty, $10, or one month	do	do
510	Injuring cultivated roots, etc	Penalty, $5, (2) or one month. 2*nd offence*, 3 months h. l.	do	do
507	Injuring fences, etc.	Penalty, $20. (2) 2*nd offence*, 3 months h. l.	do	do

(1) This may be prosecuted either by indictment or summarily.
(2) This is in addition to the amount of injury done.
(3) See Art. 841 *ante*, and see note (3) on p 747, *ante*.

LIST OF OFFENCES TRIABLE SUMMARILY.—*Continued.*

ART.	OFFENCE.	PUNISHMENT.	TRIABLE BEFORE	LIMITATION.
491	Injuring goods, etc., in railway station, etc., with intent to steal	Penalty, $20 (above value of injury), or one month (with or without h. l. or both	One Justice	Six months. (3)
507A	Injuring harbor bars	Penalty, $50	do	do
511	Injuries not otherwise provided for	Penalty, $20. (1)	do	do
508	Injuring trees, etc., whereso-ever growing. (2)	Penalty, $25, (1) or 2 months. 2*nd offence*, 3 months.	do	do
509	Injuring vegetable productions in gardens, etc. (2)	Penalty, $20. (1) 2 months in default	do	do
486	Recklessly setting fire to forest etc., on Crown domain. (4)	Fine, $50. In default, 6 months.	do	do
	NEGLIGENCE.			
255	Leaving holes in ice, or excavations, etc., unguarded	Fine or imprisonment, (with or without h. l.), or both	do	do
	OFFENSIVE WEAPONS. (See DANGEROUS WEAPONS.)			
	PERSONATION.			
457	At any Qualifying or Competitive Examination (5)	One year, or $100, fine	do	do
	PRIZE FIGHTING.			
93	Challenge to prize fight	$1000, fine (not less than $100; or 6 months, (with or without h. l.) or both	do	do
94	Principal in a prize fight	One year with or without h. l.	do	do
95	Attending prize fight	$500 fine (not less than $50), or one year (with or without h. l.), or both	do	do
97	Fight on a quarrel	Discharge; or $50 fine	do	do
96	Leaving Canada to attend a prize fight	$400 (not less than $50), or 6 months, with or without h. l.	do	do
	PUBLIC STORES.			
388	Not satisfying Justice of lawful possession of	Fine $25	Two Justices	do
389	Unlawfully dredging for stores	Fine $25, or 3 m'ths	do	do
387	Unlawfully possessing public stores not exceeding the value of $25 (6)	Fine $100, or 6 m'ths with or without h.l	do	do

(1) This is an addition to the amount of injury done.

(2) This offence is indictable if committed after two previous convictions. (See p. 502 *ante*.)

(3) See Art. 841 *ante*, and see note (3) on p. 747, *ante*

(4) This is an indictable offence, but may be dealt with by the Magistrate, summarily, when the consequences have not been serious.

(5) This is also an indictable offence. (See p. 500, *ante*.)

(6) When the value is over $25 this offence is indictable. (See p. 497 *ante*.)

LIST OF OFFENCES TRIABLE SUMMARILY.—*Continued.*

ART.	OFFENCE.	PUNISHMENT.	TRIABLE BEFORE	LIMITATION.
	PUBLIC WORSHIP.			
173	Disturbance of.....	$50 fine. One month, in default.....	One Justice	Six months. (3)
	RECEIVING.			
316	Anything unlawfully obtained the stealing of which is punishable summarily..	Same punishment as for stealing it....	do	do
391	Necessaries from Marine or Deserter (1).....	Penalty $120; six months in default	Two Justices..	do
390	Regimental necessaries (1)...	Penalty $40, or six months.....	do	do
	(See MARINE STORES.) (See SEAMAN'S PROPERTY.) (See PUBLIC STORES.) (See WRECK.)			
	SEAMAN'S PROPERTY.			
393	Not satisfying Justice of lawful possession of.....	Fine $25.....	One Justice....	do
392	Receiving, by purchase exchange, or pawn (1).....	Penalty $100 *2nd offence*, penalty $100 or six mths.	do	do
	STEALING.			
342	Cultivated roots, etc., in land not being a garden, etc...	Penalty $5, (2) or one month, *2nd offence*, 3 months *h. l*.....	do	do
339	Fences, gates, etc.....	Penalty $20, (2) *2nd offence*, 3 months *h. l*.....	do	do
341	Garden plants, fruit, etc., (4).	Penalty $20, (2) or 1 month	do	do
340	Not satisfying Justice of lawful possession of tree, etc...	Penalty $10, (2).....	do	do
337	Trees, etc., worth 25c at least (6).	Penalty $25, (2) *2nd offence*, 3 months *h. l*.....	do	do
	(See INDIAN GRAVES.)			
	TRADE MARKS.			
451	Falsely representing goods as manufactured for Her Majesty or any Government	Penalty $100.....	do	do
450	Offences against the provisions of Part XXXIII as to Trade Marks. (5).	Four months, or $100, fine. 2nd *offence*, 6 months or $250 fine (besides forfeiture).	do	do
452	Unlawfully importing goods liable to forfeiture under Part XXXIII...	Penalty $500 and forfeiture of goods	do	do

(1) This is also indictable. (See p. 497, *ante*.)
(2) This is in addition to the value of the article in question.
(3) See Art. 841 *ante*, and see note (3) on p. 747, *ante*.
(4) This offence when committed after a previous conviction is indictable. (See p. 496, *ante*.)
(5) This is also indictable. (See p. 499, *ante*.)
(6) This is indictable when committed after two previous convictions.

LIST OF OFFENCES TRIABLE SUMMARILY.—*Continued.*

ART.	OFFENCE.	PUNISHMENT.	TRIABLE BEFORE	LIMITATION.
	VAGRANCY.			
207 208	Including publicly exposing indecent show, begging, loitering, swearing, being drunk and disorderly, etc., in street, defacing signs, breaking windows, etc., common prostitution, night walking, etc., keeping or being inmate of a disorderly house, or frequenting disorderly houses, living by gaming or crime or by the avails of prostitution.....	$50, fine, or 6 months (with or without h. l.), or both.....	Two Justices ...	Six months. (1)
	WRECK.			
496	Preventing Saving of. (2).....	Penalty $400, or 6 months with or	do ...	do
381	Secreting, or receiving, or keeping wreck. (2)	without h. l..... do	do ...	do

PART LIX.

RECOGNIZANCES.

910. Render of accused by surety.—Any surety for any person charged with any indictable offence may, upon affidavit showing the grounds therefor, with a certified copy of the recognizance, obtain from a Judge of a Superior Court or from a Judge of a County Court having criminal jurisdiction, or in the province of Quebec from a district Magistrate, an order in writing under his hand, to render such person to the common gaol of the county where the offence is to be tried.

2. The sureties, under such order, may arrest such person and deliver him, with the order, to the gaoler named therein, who shall receive and imprison him in the said gaol, and shall be charged with the keeping of such person until he is discharged by due course of law. R.S.C., c. 179, ss. 1 and 2.

911. Bail after render.—The person rendered may apply to a Judge of a Superior Court, or in cases in which a judge of a County Court may admit to bail, to a Judge of a County Court, to be again admitted to bail, who may on examination allow or refuse the same, and make such order as to the number of the sureties and the amount of recognizance as he deems meet,—which order shall be dealt with

(1) See Art. 841 *ante*, and see note on p. 747, *ante*.
(2) This is indictable also.

in the same manner as the first order for bail, and so on as often as the case requires. R.S.C., c. 179, s. 3.

912. **Discharge of recognizance.**—On due proof of such render, and certificate of the Sheriff, proved by the affidavit of a subscribing witness, that such person has been so rendered, a Judge of the Superior or County Court, as the case may be, shall order an entry of such render to be made on the recognizance by the Officer in charge thereof, which shall vacate the recognizance, and may be pleaded or alleged in discharge thereof. R.S.C., c. 179, s. 4.

913. **Render in Court.**—The sureties may bring the person charged as aforesaid into the Court at which he is bound to appear, during the sitting thereof, and then, by leave of the Court, render him in discharge of such recognizance at any time before trial, and such person shall be committed to gaol, there to remain until discharged by due course of law; but such Court may admit such person to bail for his appearance at any time it deems meet. R.S.C. c. 179, s. 5.

914. **Sureties not discharged by Arraignment or Conviction.**—The arraignment or conviction of any person charged and bound as aforesaid, shall not discharge the recognizance, but the same shall be effectual for his appearance for trial or sentence, as the case may be; nevertheless the Court may commit such person to gaol upon his arraignment or trial, or may require new or additional sureties for his appearance for trial or sentence, as the case may be, notwithstanding such recognizance; and such commitment shall be a discharge of the sureties. R.S.C., c. 179, s. 6.

915. **Right of surety to render not affected.**—Nothing in the foregoing provisions shall limit or restrict any right which a surety now has of taking and rendering to custody any person charged with any such offence, and for whom he is such surety. R.S.C., c. 179, s. 7.

916. **Entry of Fines &c. on record and recovery thereof.**—Unless otherwise provided, all fines, issues, amercements and forfeited recognizances, the disposal of which is within the legislative authority of the Parliament of Canada, set, imposed, lost or forfeited before any Court of criminal jurisdiction shall, within twenty-one days after the adjournment of such Court be fairly entered and extracted on a roll by the Clerk of the Court, or in case of his death or absence, by any other person, under the direction of the Judge who presided at such Court, which roll shall be made in duplicate and signed by the Clerk of the Court, or in case of his death or absence, by such Judge.

2. If such Court is a Superior Court of 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 a division of the High Court of Justice;

(*b.*) in the provinces of Nova Scotia, New Brunswick and British Columbia, of the Supreme Court of the province;

(*c.*) in the province of Prince Edward Island, of the Supreme Court of Judicature of that province;

(*d.*) in the province of Manitoba, of the Court of Queen's Bench of that province; and

(*e.*) in the North-west Territories, of the Supreme Court of the said territories,—

on or before the first day of the term next succeeding the Court by or before which such fines or forfeitures were imposed or forfeited.

3. If such Court is a Court of General Sessions of the Peace, or a County Court, one of such rolls shall remain deposited in the office of the clerk of such Court.

4. The other of such rolls shall, as soon as the same is prepared, be sent by the Clerk of the Court making the same, or in case of his death or absence, by such Judge as aforesaid, with a writ of *fieri facias and capias*, according to the form TTT in schedule one to this Act, (1) to the Sheriff of the county in and for which such Court was holden; and such writ shall be authority to the Sheriff for proceeding to the immediate levying and recovering of such fines, issues, amercements and forfeited recognizances, on the goods and chattels, lands and tenements of the several persons named therein, or for taking into custody the bodies of such persons respectively, in case sufficient goods and chattels, lands or tenements cannot be found, whereof the sums required can be made; and every person so taken shall be lodged in the common gaol of the county, until satisfaction is made, or until the Court into which such writ is returnable, upon cause shown by the party, as hereinafter mentioned, makes an order in the case, and until such order has been fully complied with.

5. The Clerk of the Court shall, at the foot of each roll made out as herein directed, make and take an affidavit in the following form, that is to say:

"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 contained 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 whatsoever. So help me God;"

Which oath any Justice of the Peace for the county is hereby authorized to administer. R.S.C., c. 179, ss. 8, 9 and 15.

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(1) For form TTT see p. 758, *post*.

917. Officer to prepare lists of persons under recognizance making default.—If any person bound by recognizance for his appearance (or for whose appearance any other person has become so bound) to prosecute or give evidence on the trial of any indictable offence, or to answer for any common assault, or to articles of the peace, makes default, the Officer of the Court by whom the estreats are made out, shall prepare a list in writing, specifying the name of every person so making default, and the nature of the offence in respect of which such person, or his surety, was so bound, together with the residence, trade, profession or calling of every such person and surety,—and shall, in such list, distinguish the principals from the sureties, and shall state the cause, if known, why each such person did not appear and whether, by reason of the non-appearance of such person, the ends of Justice have been defeated or delayed. R.S.C., c. 179, s. 10.

918. Proceeding on forfeited recognizance not to be taken except by order of Judge &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.

919. Recognizance need not be estreated in certain cases.—Except in the cases of persons bound by recognizance for their appearance, or for whose appearance any other person has become bound to prosecute or give evidence on the trial of any indictable offence, or to answer for any common assault, or to articles of the Peace, in every case of default whereby a recognizance becomes forfeited, if the cause of absence is made known to the Court in which the person was bound to appear, the Court, on consideration of such cause, and considering also, whether, by the non-appearance of such person the ends of Justice have been defeated or delayed, may forbear to order the recognizance to be estreated ; and, with respect to all recognizances estreated, if it appears to the satisfaction of the Judge who presided at such Court that the absence of any person for whose appearance any recognizance was entered into, was owing to circumstances which rendered such absence justifiable, such Judge may make an order directing that the sum forfeited upon such estreated recognizance shall not be levied.

2. The Clerk of the Court shall, for such purpose, before sending to the sheriff any roll, with a writ of *fieri facias* and *capias*, as directed by section nine hundred and sixteen, submit the same to the Judge who presided at the Court, and such Judge may make a minute on the said roll and writ of any such forfeited recognizances and fines as he thinks fit to direct not to be levied ; and the sheriff shall

observe the direction in such minute written upon such roll and writ, or endorsed thereon, and shall forbear accordingly to levy any such forfeited recognizance or fine. R.S.C., c. 179, ss. 12 and 13.

920. Sale of lands by Sheriff under estreated recognizance.—If upon any writ issued under section nine hundred and sixteen, the Sheriff takes lands or tenements in execution, he shall advertise the same in like manner as he is required to do before the sale of lands in execution in other cases; and no sale shall take place in less than twelve months from the time the writ came to the hands of the Sheriff. R.S.C., c. 179, s. 14.

921. Discharge from custody on giving security.—If any person on whose goods and chattels a Sheriff, Bailiff or other Officer is authorized to levy any such forfeited recognizance, gives security to the said Sheriff or other Officer for his appearance at the return day mentioned in the writ, in the Court into which such writ is returnable, then and there to abide the decision of such Court, and also to pay such forfeited recognizance, or sum of money to be paid in lieu or satisfaction thereof, together with all such expenses as are adjudged and ordered by the Court, such Sheriff or Officer shall discharge such person out of custody, and if such person does not appear in pursuance of his undertaking, the Court may forthwith issue a writ of *fieri facias* and *capias* against such person and the surety or sureties of the person so bound as aforesaid. R.S.C., c. 179, s. 16.

922. Discharge of forfeited recognizance.—The Court, into which any writ of *fieri facias* and *capias* issued under the provisions of this part is returnable, may inquire into the circumstances of the case, and may in its discretion, order the discharge of the whole of the forfeited recognizance, or sum of money paid or to be paid in lieu or satisfaction thereof, and make such order thereon as to such Court appears just; and such order shall accordingly be a discharge to the Sheriff, or to the party, according to the circumstances of the case. R.S.C., c. 179, s. 17.

923. Return of writ by Sheriff.—The Sheriff, to whom any writ is directed under this Act, shall return the same on the day on which the same is made returnable, and shall state, on the back of the roll attached to such writ, what has been done in the execution thereof; and such return shall be filed in the Court into which such return is made. R.S.C., c. 179, s. 18.

924. Roll and return to be transmitted to Minister of Finance.—A copy of such roll and return, certified by the Clerk of the Court into which such return is made, shall be forthwith transmitted to the Minister of Finance and Receiver-General, with a minute thereon of any of the sums therein mentioned, which have been remitted by order of the Court, in whole or in part, or directed to be forborne, under the authority of section nine hundred and nineteen. R.S.C., c. 179, s. 19.

925. Appropriation of moneys collected by Sheriff.—The Sheriff or other Officer shall, without delay, pay over all moneys collected

under the provisions of this part by him, to the Minister of Finance and Receiver-General, or other person entitled to receive the same. R.S.C, c. 179, s. 20.

926. Quebec.—The provisions of sections nine hundred and sixteen and nine hundred and nineteen to nine hundred and twenty-four, both inclusive, shall not apply to the province of Quebec, and the following provisions shall apply to that province only:

2. Whenever default is made in the condition of any recognizance lawfully entered into or taken in any criminal case, proceeding or matter, in the province of Quebec, within the legislative authority of the Parliament of Canada, so that the penal sum therein mentioned becomes forfeited and due to the Crown, such recognizance shall thereupon be estreated or withdrawn from any record or proceeding in which it then is—or where the recognizance has been entered into orally in open Court—a certificate or minute of such recognizance, under the seal of the Court, shall be made from the records of such Court;

(*a.*) Such recognizance, certificate or minute, as the case may be, shall be transmitted by the Court, Recorder, Justice of the Peace, Magistrate or other functionary before whom the cognizor, or the principal cognizor, where there is a surety or sureties, was bound to appear, or to do that, by his default to do which the 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.

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.

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.

FORM UNDER PART LIX.

FROM SCHEDULE ONE.

TTT.—(*Section* 916.)

WRIT OF FIERI FACIAS.

Victoria, by the Grace of God, &c.

To the Sheriff of Greeting:

You are hereby commanded to levy of the goods and chattels, lands and tenements, of each of the persons mentioned in the roll or extract to this writ annexed, all and singular the debts and sums of money upon them severally imposed and charged, as therein is specified; and if any of the said several debts cannot be levied, by reason that no goods or chattels, lands or tenements can be found belonging to the said persons, respectively, then, and in all such cases, that you take the bodies of such persons, and keep them safely in the gaol of your county, there to abide the judgment of our court (*as the case may be*) upon any matter to be shown by them, respectively, or otherwise to remain in your custody as aforesaid, until such debt is satisfied unless any of such persons respectively gives sufficient security for his appearance at the said court, on the return-day hereof, for which you will be held answerable; and what you do in the premises make appear before us in our Court (*as the case may be,*) on the day of term next, and have then and there this writ. Witness, &c., G. H., clerk (*as the case may be*).

PART LX.

FINES AND FORFEITURES.

927. Appropriation of Fines, &c.—Whenever no other provision is made by any law of Canada for the application of any fine, penalty or forfeiture imposed for the violation of any such law, the same shall belong to the Crown for the public uses of Canada.

2. Any duty, penalty or sum of money, or the proceeds of any forfeiture which is by any Act, given to the Crown, shall, if no other provision is made respecting it, form part of the Consolidated Revenue Fund of Canada, and shall be accounted for and otherwise dealt with accordingly. R.S.C., c. 180, ss. 2 and 4.

928. Application of Fines, &c. by Order in Council.—The Governor in Council may from time to time direct that any fine, penalty or forfeiture, or any portion thereof, which would otherwise belong to the Crown for the public uses of Canada, be paid to any provincial, municipal or local authority, which wholly or in part bears the expenses of administering the law under which such fine, penalty or forfeiture is imposed, or that the same be applied in any other manner deemed best adapted to attain the objects of such law and to secure its due administration. R.S.C., c 180, s. 3.

929. Recovery of penalty or forfeiture.—Whenever any pecuniary penalty or any forfeiture is imposed for any violation of any Act, and no other mode is prescribed for the recovery thereof, such penalty or forfeiture shall be recoverable or enforceable, with costs, in the discretion of the Court, by civil action or proceeding at the suit of Her Majesty only, or of any private party suing as well for Her Majesty as for himself—in any form allowed in such case by the law of that province in which it is brought—before any Court having jurisdiction to the amount of the penalty in cases of simple contract—upon the evidence of any one credible witness other than the plaintiff or party interested; and if no other provision is made for the appropriation of any penalty or forfeiture so recovered or enforced, one moiety shall belong to Her Majesty, and the other moiety shall belong to the private party suing for the same, if any, and if there is none, the whole shall belong to Her Majesty. R.S.C., c. 180, s. 1.

930. Limitation of action.—No action, suit or information shall be brought or laid for any penalty or forfeiture under any such Act except within two years after the cause of action arises or after the offence is committed, unless the time is otherwise limited by such Act. R.S.C., c. 180, s. 5.

TITLE VIII.

PROCEEDINGS AFTER CONVICTION.

PART LXI.

PUNISHMENTS GENERALLY.

931. Punishment to be after conviction only.—Whenever a person doing a certain act is declared to be guilty of any offence, and to be liable to punishment therefor, it shall be understood that such person shall only be deemed guilty of such offence and liable to such punishment after being duly convicted of such act. R.S.C., c. 181, s. 1.

932. Degrees in punishment.—Whenever it is provided that the offender shall be liable to different degrees or kinds of punishment, the punishment to be inflicted shall, subject to the limitations contained in the enactment, be in the discretion of the Court or Tribunal before which the conviction takes place. R.S.C., c. 181 s. 2.

933. Liability under different provisions.—Whenever any offender is punishable under two or more Acts or two or more sections of the same Act, he may be tried and punished under any of such Acts or sections; but no person shall be twice punished for the same offence. R.S.C., c. 181, s. 3.

934. Fine imposed shall be in the discretion of the Court. — Whenever a fine may be awarded or a penalty imposed for any offence, the amount of such fine or penalty shall, within such limits, if any, as are prescribed in that behalf, be in the discretion of the Court or person passing sentence or convicting, as the case may be. R.S.C., c. 181, s. 33.

PART LXII.

CAPITAL PUNISHMENT.

935. Punishment to be the same on conviction by verdict or by confession.—Every one who is indicted as principal or accessory for any offence made capital by any statute, shall be liable to the same

punishment, whether he is convicted by verdict or on confession, and this as well in the case of accessories as of principals. R.S.C., c. 181, s. 4.

936. Form of Sentence of Death.—In all cases where an offender is sentenced to death the sentence or judgment to be pronounced against him shall be, that he be hanged by the neck until he is dead. R.S.C., c, 181, s. 5.

937. Sentence of Death to be reported to Secretary of State.—In the case of any prisoner sentenced to the punishment of death, the Judge before whom such prisoner has been convicted shall forthwith make a report of the case to the Secretary of State, for the information of the Governor General; and the day to be appointed for carrying the sentence into execution shall be such as, in the opinion of the Judge, will allow sufficient time for the signification of the Governor's pleasure before such day, and if the Judge thinks such prisoner ought to be recommended for the exercise of the Royal Mercy, or if, from the non-decision of any point of law reserved in the case, or from any other cause, it becomes necessary to delay the execution, he, or any other Judge of the same Court, or who might have held or sat in such Court, may, from time to time, either in term or in vacation, reprieve such offender for such period or periods beyond the time fixed for the execution of the sentence as are necessary for the consideration of the case by the Crown. R.S.C., c. 181, s. 8.

938. Prisoner under Sentence of Death to be confined apart.—Every one who is sentenced to suffer death shall, after judgment, be confined in some safe place within the prison, apart from all other prisoners; and no person except the gaoler and his servants, the Medical Officer or Surgeon of the prison and a Chaplain or a Minister of Religion, shall have access to any such convict, without the permission, in writing, of the Court or Judge before whom such convict has been tried, or of the Sheriff. R.S.C., c. 181, s. 9.

939. Place of execution.—Judgment of death to be executed on any prisoner shall be carried into effect within the walls of the prison in which the offender is confined at the time of execution. R.S.C., c. 181, s. 10.

940. Persons who shall be present at execution.—The Sheriff charged with the execution, and the gaoler and Medical Officer or Surgeon of the prison, and such other Officers of the prison and such persons as the Sheriff requires, shall be present at the execution. R.S.C., c. 181, s. 11.

941. Persons who may be present at execution.—Any Justice of the Peace for the district, county or place to which the prison belongs, and such relatives of the prisoner or other persons as it seems to the Sheriff proper to admit within the prison for the purpose, and any minister of religion who desires to attend, may also be present at the execution. R.S.C., c. 181, s. 12.

942. **Certificate of death.**—As soon as may be after judgment of death has been executed on the offender, the Medical Officer or Surgeon of the prison shall examine the body of the offender, and shall ascertain the fact of death, and shall sign a certificate thereof, in the form UUU in schedule one hereto, (1) and deliver the same to the Sheriff.

2. The Sheriff and the gaoler of the prison, and such Justices and other persons present, if any, as the Sheriff requires or allows, shall also sign a declaration in the form VVV in the said schedule to the effect that judgment of death has been executed on the offender. (1) R.S.C., c. 181, ss. 13 and 14.

943. **When deputies may Act.**—The duties imposed upon the Sheriff, Gaoler, Medical Officer or Surgeon by the two sections next preceding, may be and, in his absence, shall be performed by his lawful deputy or assistant, or other officer or person ordinarily acting for him, or conjointly with him, or discharging the duties of any such Officer. R.S.C., c. 181, s. 15.

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 proceeding sections of this part shall not make the execution of judgment of death illegal in any case

(1) For Forms UUU, and VVV, see p. 772, *post*.

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.

950. Offences not capital,—How punished.—Every one who is convicted of any offence not punishable with death shall be punished in the manner, if any, prescribed by the Statute especially relating to such offence R.S.C., c. 181, s. 23.

951. Imprisonment in cases not specially provided for.—(*Amended by* 56 *Vict. c.* 32.) Every person convicted of any indictable offence for which no punishment is specially provided, shall be liable to imprisonment for five years.

2. Every one who is summarily convicted of any offence for which no punishment is specially provided, shall be liable to a penalty not exceeding fifty dollars, or to imprisonment, with or without hard labour, for a term not exceeding six months, or to both. R.S.C., c. 181, s. 24.

952. Punishment for offence committed after previous conviction.—Every one who is convicted of an indictable offence, not punishable with death, committed after a previous conviction for an indictable offence, is liable to imprisonment for ten years, unless some other punishment is directed by any statute for the particular offence,—in which case the offender shall be liable to the punishment thereby awarded, and not to any other. R.S.C., c. 181, s. 25.

953. Imprisonment may be for shorter term than that prescribed. —Every one who is liable to imprisonment for life, or for any term of years, or other term, may be sentenced to imprisonment for any shorter term: Provided, that no one shall be sentenced to any shorter term of imprisonment than the minimum term, if any, prescribed for the offence of which he is convicted. R.S.C., c. 181, s. 26.

954. Cumulative Punishments.—When an offender is convicted of more offences than one, before the same Court or person at the same sitting, or when any offender, under sentence or undergoing punishment for one offence, is convicted of any other offence, the Court or person passing sentence may, on the last conviction, direct that the sentences passed upon the offender for his several offences shall take effect one after another. R.S.C., c. 181, s. 27.

955. Imprisonment in Penitentiary, etc. — Every one who is sentenced to imprisonment for life, or for a term of years, not less than two, shall be sentenced to imprisonment in the penitentiary for the province in which the conviction takes place.

2. Every one who is sentenced to imprisonment for a term less than two years shall, if no other place is expressly mentioned, be sentenced to imprisonment in the common gaol of the district, county or place in which the sentence is pronounced, or if there is no common gaol there, then in that common gaol which is nearest to such locality, or in some lawful prison or place of confinement, other than a penitentiary, in which the sentence of imprisonment may be lawfully executed.

3. Provided that where any one is sentenced to imprisonment in a penitentiary, and at the same sittings or term of the Court trying him is sentenced for one or more other offences to a term or terms of imprisonment less than two years each, he may be sentenced for such shorter terms to imprisonment in the same penitentiary, such sentences to take effect from the termination of his other sentence.

4. Provided further that any prisoner sentenced for any term by any Military, Naval or Militia Court-Martial, or by any Military or Naval authority under any Mutiny Act, may be sentenced to imprisonment in a penitentiary; and if such prisoner is sentenced to a term less than two years, he may be sentenced to imprisonment in the common gaol of the district, county or place in which the sentence is pronounced, or in such other prison or place of confinement as is provided by subsection two of this section with respect to persons sentenced thereunder.

5. Imprisonment in a penitentiary, in the Central Prison for the province of Ontario, in the Andrew Mercer Ontario Reformatory for females, and in any reformatory prison for females in the province of Quebec, shall be with hard labour, whether so directed in the sentence or not.

6. Imprisonment in a common gaol, or a public prison, other than those last mentioned, shall be with or without hard labour, in the

discretion of the Court or person passing sentence, if the offender is convicted on indictment, or under the provisions of Parts LIV. or LV., or before a Judge of the Supreme Court of the North-West Territories, and in other cases may be with hard labour, if hard labour is part of the punishment for the offence of which such offender is convicted,—and if such imprisonment is to be with hard labour, the sentence shall so direct.

7. The term of imprisonment, in pursuance of any sentence, shall, unless otherwise directed in the sentence, commence on and from the day of passing such sentence, but no time during which the convict is out on bail shall be reckoned as part of the term of imprisonment to which he is sentenced.

8. Every one who is sentenced to imprisonment in any penitentiary, gaol, or other public or reformatory prison, shall be subject to the provisions of the Statutes relating to such penitentiary, gaol or prison, and to all rules and regulations lawfully made with respect thereto. R.S.C., c. 181, s. 28; 53 V., c. 37, s. 31.

956. **Imprisonment in Reformatories.**—The Court or person before whom any offender whose age at the time of his trial does not, in the opinion of the Court, exceed sixteen years, is convicted, whether summarily or otherwise, of any offence punishable by imprisonment, may sentence such offender to imprisonment in any reformatory prison in the province in which such conviction takes place, subject to the provisions of any Act respecting imprisonment in such reformatory; and such imprisonment shall be substituted, in such case, for the imprisonment in the penitentiary or other place of confinement by which the offender would otherwise be punishable under any Act or law relating thereto: Provided, that in no case shall the sentence be less than two years' or more than five years' confinement in such reformatory prison; and in every case where the term of imprisonment is fixed by law to be more than five years, then such imprisonment shall be in the penitentiary.

2. Every person imprisoned in a reformatory shall be liable to perform such labour as is required of such person. R.S.C., c. 181, s. 29.

PART LXIV.

WHIPPING.

957. **Sentence of punishment by whipping.**—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; and the number of strokes and the instrument with which they shall be inflicted shall be specified by the Court in the sentence; and, when-

ever 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.

2. Whipping shall not be inflicted on any female. R.S.C., c. 181, s. 30.

PART XLV.

SURETIES FOR KEEPING THE PEACE, AND FINES.

958. Persons convicted may be fined and bound over to keep the peace.—(*As amended by* 56 *Vict., c.* 32.) Every Court of criminal jurisdiction and every Magistrate under Part LV. before whom any person shall be convicted of an offence and shall not be 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 of an 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. R.S.C., c. 181, s. 31.

959. Recognizance to keep the Peace.—(*As Amended by* 56 *Vict.*; *c.* 32.) Whenever any person is charged before a Justice with an offence triable under Part LVIII which, in the opinion of such Justice, is directly against the peace, and the Justice after hearing the case is satisfied of the guilt of the accused, and that the offence was committed under circumstances which render it probable that the person convicted will be again guilty of the same or some other offence against the peace unless he is bound over to good behaviour, such Justice may, in addition to, or in lieu of, any other sentence which may be imposed upon the accused, require him forthwith to enter into his own recognizances, or to give security to keep the peace and be of good behaviour for any term not exceeding twelve months.

2. Upon complaint by or on behalf of any person that on account of threats made by some other person or on any other account, he, the complainant, is afraid that such other person will do him, his wife or child some personal injury, or will burn or set fire to his

property, the Justice before whom such complaint is made, may, if he is satisfied that the complainant has reasonable grounds for his fears, require such other person to enter into his own recognizances, or to give security, to keep the peace, and to be of good behaviour, for a term not exceeding twelve months.

3. The provisions of Part LVIII shall apply so far as the same are applicable to proceedings under this section, and the complainant and defendant and witnesses may be called and examined, and cross-examined, and the complainant and defendant shall be subject to costs as in the case of any other complaint.

4. If any person so required to enter into his own recognizances or give security as aforesaid, refuses or neglects so to do, the same or any other Justice may order him to be imprisoned for any term not exceeding twelve months.

5. The forms WWW, XXX and YYY, with such variations and additions as the circumstances may require, may be used in proceedings under this section. (1)

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.

961. Consequence 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

(1) For forms WWW, XXX and YYY, see pp. 773, and 774, *post*.

fund, such office or employment shall forthwith become vacant, and such pension or superannuation allowance or emolument shall forthwith determine and cease to be payable, unless such person receives a free pardon from Her Majesty, within two months after such conviction, or before the filling up of such office or employment, if given at a later period; and such person shall become, and (until he suffers the punishment to which he is sentenced, or such other punishment as by competent authority is substituted for the same, or receives a free pardon from Her Majesty) shall continue thenceforth incapable of holding any office under the Crown, or other public employment, or of being elected, or sitting, or voting, as a member of either House of Parliament, or of exercising any right of suffrage or other parliamentary or municipal franchise. 33–34 V. (U. K.) c. 23, s. 2.

2. The setting aside of a conviction by competent authority shall remove the disability herein imposed.

PART LXVII.

PUNISHMENTS ABOLISHED.

962. Outlawry.—Outlawry in criminal cases is abolished.

See comments on this subject at p. 610 *ante*, and also the remarks,—there set out,—of the Royal Commissioners. And see also the Extradition Act at the end of Extra Appendix, *post*.

963. Solitary Confinement.—Pillory.—The punishment of solitary confinement or of the pillory shall not be awarded by any Court. R.S.C., c. 181, s. 34.

964. Deodand.—There shall be no forfeiture of any chattels, which have moved to or caused the death of any human being, in respect of such death. R.S.C., c. 181, s. 35.

Under the old common law of England a deodand was any personal chattel, —such as a cart, a horse, a wheel, a sword, *etc.*,—which was the immediate cause of the death of any human being; and all the owner's property in "*the unhappy instrument*," as Hawkins terms it, was forfeited to the Crown to be applied to pious uses by the High Almoner. (1) By the laws of the ancient Saxons, "If one in hewing a tree happened to kill a man, the relations were entitled to the tree, provided they took it within 30 days. This was in the nature and might perhaps be the origin of *deodanda*." (2) A deodand was not a forfeiture for felony or treason; but was allowed only where the killing was by misadventure, or accidental, not felonious. (3)

965. Attainder.—From and after the passing of this Act no confession verdict, inquest, conviction or judgment of or for any treason

(1) 1 Hawk, P. C. ss. 3, 6, p. 74: 1 Bl. Com. 300.
(2) 1 Reeves Hist. Eng. Law, 3 Ed. 17.
(3) R. v. Polwart, 1 Gale & D. 211; 1 Q. B. 818.

or indictable offence or *felo de se* shall cause any attainder or corruption of blood, or any forfeiture or escheat; Provided that nothing in this section shall affect any fine or penalty imposed on any person by virtue of his sentence, or any forfeiture in relation to which special provision is made by any Act of the Parliament of Canada. 33-34 V. (U.K.) c. 23, ss. 1, 6 and 5.

In the primary sense of the word, ATTAINDER was the status, or, according to the old law, the taint, or stain, or corruption of blood of one condemned, by the judgment of the Court, for treason or felony; in the secondary sense, it was the judgment itself. The judgment must have been final, and rendered either after conviction or outlawry: and then the offender was said to be attaint or attainted (1)

The consequences of attainder were by the ancient common law wide and sweeping. All the property real and personal of one attainted was forfeited, his blood was corrupted, so that nothing could pass by inheritance to, from, or through him; he could not sue in a Court of Justice; and his wife, children and collateral relations suffered with him, so that the tree, falling, came down with all its branches (2)

LXVIII.

PARDONS.

966. **Pardon by the Crown.**—The Crown may extend the Royal Mercy to any person sentenced to imprisonment by virtue of any Statute, although such person is imprisoned for non-payment of money to some person other than the Crown.

2. Whenever the Crown is pleased to extend the Royal Mercy to any offender convicted of an indictable offence punishable with death or otherwise, and grants to such offender either a free or a conditional pardon, by warrant under the Royal sign manual, countersigned by one of the principal Secretaries of State, or by warrant under the hand and seal-at-arms of the Governor-General, the discharge of such offender out of custody, in case of a free pardon, and the performance of the condition in the case of a conditional pardon, shall have the effect of a pardon of such offender, under the great seal, as to the offence for which such pardon has been granted; but no free pardon, nor any discharge in consequence thereof, nor any conditional pardon, nor the performance of the condition thereof, in any of the cases aforesaid, shall prevent or mitigate the punishment to which the offender might otherwise be lawfully sentenced, on a subsequent conviction for any offence other than that for which the pardon was granted. R.S.C., c. 181, ss. 38 and 39.

967. **Commutation of sentence.**—The Crown may commute the sentence of death passed upon any person convicted of a capital

(1) R. v. Earbery, Fort. 37; 4 Bl Com. 380, 381; 2 Inst. 212.
(2) Co. Lit. 392, 130*a*; Coombes v. Queen's Proctor, 16 Jur. 820; 24 Eng. L. & Eq. 598.

offence to imprisonment in the penitentiary for life, or for any term of years not less than two years, or to imprisonment in any gaol or other place of confinement for any period less than two years, with or without hard labour; and an instrument under the hand and seal-at-arms of the Governor-General, declaring such commutation of sentence, or a letter or other instrument under the hand of the Secretary of State or of the Under Secretary of State, shall be sufficient authority to any Judge or Justice, having jurisdiction in such case, or to any Sheriff or Officer to whom such letter or instrument is addressed, to give effect to such commutation, and to do all such things and to make such orders, and to give such directions, as are requisite for the change of custody of such convict, and for his conduct to and delivery at such gaol or place of confinement or penitentiary, and his detention therein, according to the terms on which his sentence has been commuted. R.S.C., c. 181, s. 40.

As to the powers of the Lieutenant Governors of the provinces to commute and remit sentences, *etc.* for offences against provincial laws, the question is now before the Supreme Court of Canada, in a case involving the legality or illegality of an Ontario statute,—51 Vic., c 5,—which declares that, in matters within the jurisdiction of the legislature of Ontario, all powers, *etc.*, which were vested in or exerciseable by the Governors or Lieutenant-Governors of the several provinces before Confederation, shall be vested in and exerciseable by the Lieutenant-Governor of the province of Ontario. In the Chancery Division of the High Court of Justice of Ontario, and in the Court of Appeal of that province it has been declared that, that Act is valid, and that the power of commuting and remitting sentences for offences against the laws of the province or offences over which the legislative authority of the province extends, which power is, by the terms of the Act, included in the powers above mentioned, does not affect offences against the criminal laws which are the subject of Dominion legislation, but refers only to offences within the Jurisdiction of the provincial legislature. (1)

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

(1) Atty. Gen. for Can. v. Atty Gen. of Ont., 20 Ont. Rep. 222: 19 Ontario App. Cas. 31.

such person, he shall be released from all further or other criminal proceedings for the same cause. R.S.C., c. 181, s. 42.

970. Royal prerogative.—Nothing in this part shall in any manner limit or affect Her Majesty's Royal Prerogative of Mercy. R.S.C., c 181, s. 43.

971. Conditional release of first offenders in certain cases.—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 youth, 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. 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. 52 V., c. 44, s. 2.

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.

974. Interpretation.—In the three next preceding sections the expression "Court" means and includes any Superior Court of criminal jurisdiction, any "Judge" or Court within the meaning of Part LV., and any "Magistrate" within the meaning of Part LVI. of this Act. 52 V., c. 44, s. 1.

FORMS UNDER TITLE VIII.

FROM SCHEDULE ONE.

UUU.—(*Section* 942.)

CERTIFICATE OF EXECUTION OF JUDGMENT OF DEATH.

I, A. B., surgeon (*or as the case may be*) of the (*describe the prison*), hereby certify that I, this day, examined the body of C. D., on whom judgment of death was this day executed in the said prison; and that on such examination I found that the said C. D. was dead.

(Signed), A. B.

Dated this day of , in the year .

VVV.—(*Section* 942.)

DECLARATION OF SHERIFF AND OTHERS.

We, the undersigned, hereby declare that judgment of death was this day executed on C. D., in the (*Describe the prison*) in our presence.

Dated this day of , in the year .

E. F., Sheriff of——

L. M., Justice of the Peace for——

G. H., Gaoler of——

&c., &c.

WWW.—(*Section* 959.)

COMPLAINT BY THE PARTY THREATENED, FOR SURETIES FOR THE PEACE.

Canada,
Province of ,
County of .

The information (*or* complaint) of C. D, of in the said county of , (*labourer*), (*if preferred by an attorney or agent, say*—by D. E., his duly authorized agent (*or* attorney), in this behalf), taken upon oath, before me, the undersigned, a Justice of the Peace, in and for the said county of , at in the said county of , this day of , in the year , who says that A. B., of in the said county, did, on the day of (instant *or* last past), threaten the said C. D. in the words or to the effect following, that is to say: (*set them out, with the circumstances under which they were used*); and that from the above and other threats used by the said A. B. towards the said C. D., he, the said C. D., is afraid that the said A. B. will do him some bodily injury, and therefore prays that the said A. B. may be required to find sufficient sureties to keep the peace and be of good behaviour towards him, the said C. D.; and the said C. D. also says that he does not make this complaint against nor require such sureties from the said A. B. from any malice or ill-will, but merely for the preservation of his person from injury.

XXX.—(*Section* 959.)

FORM OF RECOGNIZANCE FOR THE SESSIONS.

Canada,
Province of ,
County of .

Be it remembered that on the day of , in the year , A. B. of , (*labourer*), L. M. of , (*grocer*), and N. O., of , (*butcher*), personally came before (*us*) the undersigned, (*two*) Justices of the Peace for the county of , and severally acknowledged themselves to owe to our Lady the Queen the several sums following, that is to say: the said A. B. the sum of , and the said L. M and N. O. the sum of , each, of good and lawful money of Canada, to be made and levied of their goods and chattels, lands and tenements respectively, to the use of our said Lady the Queen, her heirs and successors, if he, the said A. B, fails in the condition endorsed (*or* hereunder written).

Taken and acknowledged the day and year first above mentioned at before us.

J. S.,
J. T.,
J. P.'s, (Name of county.)

The condition of the within (*or* above) written recognizance is such that if the within bound A. B. (of, &c.), * appears at the next Court of General Sessions of the Peace, (*or other Court discharging the functions of the Court of General Sessions*), to be holden in and for the said county of , to do and receive what is then and there enjoined him by the Court, and in the meantime * keeps the peace and is of good behaviour towards Her Majesty and her liege people, and specially towards C. D. (of, &c.) for the term of now next ensuing, then the said recognizance to be void, otherwise to stand in full force and virtue.

The words between the asterisks * * to be used only where the principal is required to appear at the sessions of such other Court.

YYY.—(*Section* 959.)

FORM OF COMMITMENT IN DEFAULT OF SURETIES.

Canada ,
Province of
County of .

To all or any of the other Peace Officers in the county of , and to the keeper of the common gaol of the said county, at , in the said county.

Whereas on the day of (*instant*), complaint on oath was made before the undersigned (*or* J. L., Esquire, a Justice of the Peace in and for the said county of , by C. D., of , in the said county, (*labourer*), that A. B., of (&c.), on the . day of , at aforesaid, did threaten (*&c., follow to the end of complaint, as in form above, in the past tense, then*): And whereas the said A. B. was this day brought and appeared before me, the said Justice (*or* J. L., Esquire, a Justice of the Peace in and for the said county of), to answer unto the said complaint; and, having been required by me to enter into his own recognizance in the sum of , with two sufficient sureties in the sum of each, * as well for his appearance at the next General Sessions of the Peace (*or other Court discharging the functions of the Court of General Sessions, or as the case may be*), to be held in and for the said county of , to do what shall be then and there enjoined him by the Court, as also in the meantime * to keep the Peace and be of good behaviour towards Her Majesty and her liege people, and especially towards

the said C. D., has refused and neglected, and still refuses and neglects, to find such sureties: These are, therefore, to command you, and each of you, to take the said A. B., and him safely to convey to the (common gaol) at aforesaid, and there to deliver him to the keeper thereof, together with this precept: And I do hereby command you, the said keeper of the said (common gaol), to receive the said A. B. into your custody in the said (common gaol), there to imprison him until the said next General Sessions of the Peace (*or the next term or sitting of the said Court discharging the functions of the Court of General Sessions, or as the case may be*), unless he, in the meantime, finds sufficient sureties as well for his appearance at the said Sessions (*or* Court) as in the meantime to keep the Peace as aforesaid.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

J. P., (*Name of county.*)

The words between the asterisks ** to be used when the recognizance is to be so conditioned.

TITLE IX.

ACTIONS AGAINST PERSONS ADMINISTERING THE CRIMINAL LAW.

975. Time and place for action.—Every action and prosecution against any person for anything purporting to be done in pursuance of any Act of the Parliament of Canada relating to criminal law, shall, unless otherwise provided, be laid and tried in the district, county or other judicial division, where the act was committed, and not elsewhere, and shall not be commenced except within six months next after the act committed. R.S.C., c. 185, s. 1.

976. Notice of Action.—Notice in writing of such action and of the cause thereof, shall be given to the defendant one month at least before the commencement of the action. R.S.C., c. 185, s. 2.

977. Defense.—In any such action the defendant may plead the general issue, and give the provisions of this title and the special matter in evidence at any trial had thereupon. R.S.C., c. 185, s. 3.

978. Tender or payment in Court.—No plaintiff shall recover in any such action if tender of sufficient amends is made before such action brought, or if a sufficient sum of money is paid into Court by or on behalf of the defendant after such action brought. R.S.C., c. 185, s. 4.

979. Costs.—If such action is commenced after the time hereby limited for bringing the same, or is brought or the venue laid in any other place than as aforesaid, a verdict shall be found or judgment shall be given for the defendant; and thereupon or if the plaintiff becomes nonsuit, or discontinues any such action after issue joined, or if upon demurrer or otherwise judgment is given against the plaintiff, the defendant shall, in the discretion of the Court, recover his full costs as between solicitor and client, and shall have the like remedy for the same as any defendant has by law in other cases; and although a verdict or judgment is given for the plaintiff in any such action, such plaintiff shall not have costs against the defendant, unless the Judge, before whom the trial is had, certifies his approval of the action. R.S.C., c. 185, s. 5.

980. Other remedies saved.—Nothing herein shall prevent the effect of any Act in force in any province of Canada, for the protection of Justices of the Peace or other officers from vexatious actions for things purporting to be done in the performance of their duty. R.S.C., c. 185, s. 6.

TITLE X.

REPEAL, &c.

981. Statutes Repealed.—The several Acts set out and described in schedule two to this Act shall, from and after the date appointed for the coming into force of this Act, be repealed to the extent stated in the said schedule.

2. The provisions of this Act which relate to procedure shall apply to all prosecutions commenced on or after the day upon which this Act comes into force, in relation to any offence whensoever committed. The proceedings in respect of any prosecution commenced before the said date otherwise than under the Summary Convictions Act, shall, up to the time of committal for trial, be continued as if this Act had not been passed, and after committal for trial shall be subject to all the provisions of this Act relating to procedure so far as the same are applicable thereto. The proceedings in respect of any prosecutions commenced before the said day, under the Summary Convictions Act, shall be continued and carried on as if this Act had not been passed. (*As amended by* 56 *Vic. c* 32.)

982. Forms in schedule one to be valid.—The several forms in schedule one to this Act, varied to suit the case or forms to the like effect, shall be deemed good, valid and sufficient in law.

983. Application of Act to N. W. T. and Keewatin.—Not to affect H. M's forces.—The provisions of this Act extend to and are in force in the North-West Territories and the district of Keewatin except in so far as they are inconsistent with the provisions of the *North-West Territories Act* or *The Keewatin Act* and the amendments thereto.

2. Nothing in this Act shall affect any of the laws relating to the Government of Her Majesty's Land or Naval Forces.

3. Nothing herein contained shall affect the Acts and parts of Acts in the appendix to this Act; And in construing such parts reference may be had to the repealed portions of the Act of which respectively they form parts, as well as to any sections of this Act which have been substituted therefor, or which deal with like matters.

THE CANADA EVIDENCE ACT 1893.

[56 VICT. c. 31.]

An Act respecting Witnesses and Evidence.

[*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 :—

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.

WITNESSES.

3. Interest or crime, no bar.—A person shall not be incompetent to give evidence by reason of interest or crime.

4. Accused and husband and wife competent.—Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness, whether the person so charged is charged solely or jointly with any other person. Provided, however, that no husband shall be competent to disclose any communication made to him by his wife during their marriage, and no wife shall be competent to disclose any communication made to her by her husband during their marriage.

2. The failure of the person charged, or of the wife or husband of such person, to testify, shall not be made the subject of comment by the Judge or by Counsel for the prosecution in addressing the Jury.

Will this Article render a defendant competent as a witness on his own behalf when charged with an offence punishable under a provincial statute or a municipal by-law ? In other words, does subsection 27 of section 91 of the B. N. A. Act. 1867, extend so far as to vest in the Dominion Parliament *exclusive* legislative authority to regulate procedure, (including, of course, evidence, as a branch of procedure), in relation to *all* criminal offences, no matter by what authority punishable,—that is, whether punishable by virtue of Dominion, Provincial, Municipal or other laws ? Or, is subsection 15 of section 92 of the B. N. A. Act., (which gives provincial legislatures authority to make laws

imposing the punishment by fine, penalty, or imprisonment for the enforcement of provincial laws), to be construed as conferring on the provincial legislatures the power to regulate the procedure in regard to offences against provincial laws? And are there, therefore, as some have contended, two sets of criminal offences,—*Federal* crimes and *Provincial* crimes. Section 91, subsection 27 of the B. N. A. Act declares that the exclusive legislative authority of the Dominion Parliament extends to all matters relating to the *criminal law*, except the constitution of the Courts, but *including the procedure in criminal matters*. This language is very broad, and certainly seems to cover procedure in *all* criminal matters whatsoever; and as subsection 15 of section 92 says nothing at all about procedure, it seems, that, in empowering provincial legislatures to impose a fine or penalty or imprisonment for infraction of provincial laws,—it merely confers upon the provincial legislatures a *special* and *limited* authority concurrent with the *general* authority which the Dominion Parliament possesses over *all* criminal matters and criminal procedure.

When, under the limited authority conferred upon them, provincial legislatures impose a fine or a penalty or imprisonment for a disobedience of a provincial law, they do not thereby create the criminal offence involved in such disobedience. Disobedience of a statute is a crime under the common law; it is a crime under the general criminal law of the country; and the Criminal Code itself (see Article 138, *ante*) expressly makes it an indictable offence to unlawfully disobey any Act of any legislature in Canada, and enacts that the offender shall be liable to one years imprisonment, unless there is some other punishment expressly provided by law. So, that, if the limited authority given to provincial legislatures by the B. N. A. Act were not in existence at all, or, if, though in existence, it were not exercised, a contravention of a provincial statute would be punishable under the general criminal law, controlled by the Dominion Parliament; and, surely, the mere fact that the provincial legislatures are granted a limited right to the extent of fixing the punishment in the case of a criminal offence which contravenes a provincial statute, - a limited right which does not override but is in aid of the general powers of the Dominion Parliament, - cannot give them the further right to regulate, in regard to such offences, the criminal procedure over which the Dominion Parliament has been given exclusive control,—in order, no doubt, to secure, in the trial of criminal offences, uniformity of procedure all over Canada.

It is not easy to reconcile the decisions in some of the cases which have arisen upon the questions involved in this subject, and which will be briefly noticed below; but there seems a good deal of reason in the contention that when the subject matter of a proceeding before a Justice or a Magistrate is in the nature of a criminal offence it should have applied to it the general law of criminal procedure, whether it is based upon an infraction of a provincial Act, or otherwise.

In Roddy's case the defendant, who was accused of selling liquor on Sunday in violation of the License Act 37 Vic. c. 32, secs. 28 & 34, (Ont.) was convicted on his own evidence, the prosecution having called him against his own protest as a witness, under the authority of 36 Vic c. 10, sec. 4 (Ont), rendering a defendant a competent and compellable witness in any matter, *not being a crime;* the position taken being that a violation of the license laws was *not* a crime.

In Appeal the question was thoroughly gone into; and Harrison, C. J., rendered the judgment of the Court quashing the conviction He referred to sec. 91, sub-sec. 27 of the B N. A. Act, and said that as the provincial legislatures have no direct power to legislate either as to crime or criminal procedure, the question was whether the charge against the defendant was a charge of crime. He then quoted from Paley on convictions as follows: "The question, what is a criminal proceeding as the subject of summary conviction depends on the manner in which the Legislature have treated the cause of complaint; and for this purpose the scope and object of the statute as well as the language of its particular enactments should be considered. It may be as a general rule

that every proceeding before a Magistrate where he has power to convict in contradistinction to the power of making an order is a criminal proceeding, whether the Magistrate be authorized in the first instance to direct payment of a sum of money as a penalty, or at once to adjudge the defendant to be imprisoned; and it must be borne in mind that where a statute orders, enjoins or prohibits an act, every disobedience is punishable at common law by indictment. In such cases the addition of a penalty to be recovered by summary conviction can hardly prevent the proceeding from being a criminal one." (1)

After reviewing a number of decisions as to what particular offences are crimes, the learned Chief Justice concluded that the offence of selling liquor on Sunday being one of public interest and being punishable by fine or imprisonment with hard labor, it was so far of a criminal nature that the defendant ought not to have been compelled to give evidence against himself. (2)

In England the parties and the husbands or wives of the parties to an action or other civil proceeding are competent witnesses on their own behalf or for or against each other, but they are not competent as a general rule in any criminal proceedings whether triable on indictment, or summarily; (3) and the question of whether a defendant could be examined as a witness in a proceeding before a Justice or a Magistrate has been held, there, in a number of cases, to depend upon the further question whether it was a criminal proceeding in which the defendant was charged with committing an offence punishable on summary conviction. For instance where a licensed public house keeper was prosecuted under the English Liquor License Laws for unlawfully permitting persons of notoriously bad character to assemble together in his house, against the tenor of his license, it was held that he was not a competent witness, Wightman, J., being of opinion that the statute treated the offence as a crime. (4)

In a case against a physician charged with violating a law of the province of Ontario, by practising without being registered, it was held that as this was a crime the defendant could not be a witness under 36 Vic, c. 10, sec, 4. (Ont.) (5).

In another Ontario case in which the defendant was charged with the violation of a Municipal by-law, and as the offence was a criminal offence he was held incompetent to give evidence. (6)

In a recent case, upon the trial, before a Police Magistrate, of an offence against a City by-law in erecting a wooden building within the fire limits, the defendant was compelled to give evidence under sec. 9, R.S.C. c. 61, which enacts that on the trial before any Justice of the Peace, Mayor, or Police Magistrate of any matter or question *not being a crime*, the party opposing or defending shall be competent and compellable to give evidence; and, the defendant being convicted, it was held by the Common Pleas Division in quashing the conviction that an offence against the by-law in question was a criminal offence, and that therefore the defendant was not a competent nor compellable witness, (7)

In a still more recent case where a defendant was convicted by the Police Magistrate of Toronto, for selling liquor without a license (contrary to sec. 70 of

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(1) Paley Sum. Conv., 5 Ed. 112, 113; 6 Ed. p. 118; See R. v. J. J Gloucestershire, L. R. 4 Q. B. 225; 38 L J. (M C.) 73.

(2) R. v. Roddy, 41 U. C. Q. B. 291.

(3) 14 and 15 Vict., c. 99, secs 2 and 3, (Imp.); 16 and 17 Vict., c. 83, (Imp.).

(4) Parker v. Green, 9 Cox, C. C., 169; 2 B. & S. 299; 31 L. J. (M. C) 133. See Catell v. Ireson, E. B. & E. 91; 27 L. J. (M. C.) 167; Atty. Gen. v. Radloff, 10 Exch. 84; 23 L J., Exch., 240, S. C.; Atty. Gen. v. Sillem, 32 L. J., Exch., 92, 101; Mellor v. Denham, 5 Q. B. D. 467; R. v. Whitchurch, 7 Q. B. D. 534, Atty. Gen. v. Bradlaugh. 14 Q. B. D 669.

(5) R. v. Sparham, 8 Ont. Rep. 570.

(6) R. v. McNicholl, 11 Ont. Rep. 659.

(7) R. v. Hart, 20 Ont. Rep. 611. See R, v. Wason, 17 App. Rep. (Ont.) 221; R. v. Dunning 14 Ont. Rep. 52.

the Liquor License Act, R. S. C. c. 194,) it was contended for the defendant upon a motion to quash the conviction, on the ground of the defendant's evidence on his own behalf having been rejected when tendered, that the defendant was a comp tent witness under sec. 114 R.S.C. c. 106, (The Canada Temperance Act) but it was contended for the prosecution that sec. 114 of the Canada Temperance Act is *ultra vires* of the Dominion Parliament and that the province alone has the right to regulate the procedure under the Liquor License Act; and it was held by the Common Pleas Division (Galt, C. J., and McMahon, J.) that notwithstanding the reservation of criminal procedure to the Dominion Parliament in subsection 27 of section 91 of the B. N. A Act, a provincial legislature has power to regulate and provide for the course of trial and adjudication of offences against its lawful enactments, such as a breach of the Liquor License Law,—as in the present case,—even though such offences may be termed crimes, and that therefore they have the power to regulate the giving of evidence by the defendant in such cases, as is done by R.S.C. c. 61, sec. 9, by providing that where the proceeding is a crime under the provincial law the defendant is neither a competent nor compellable witness. (1)

5. Incriminating Answers.—No person shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any other person: Provided, however, that no evidence so given shall be used or receivable in evidence against such person in any criminal proceeding thereafter instituted against him other than a prosecution for perjury in giving such evidence.

6. Evidence of mute.—A witness who is unable to speak, may give his evidence in any other manner in which he can make it intelligible.

DOCUMENTARY EVIDENCE.

7. Imperial Acts &c.—Judicial notice shall be taken of all Acts of the Imperial Parliament, of all ordinances made by the Governor in Council, or the Lieutenant-Governor in Council of any province or colony which, or some portion of which, now forms or hereafter may form part of Canada, and of all the Acts of the legislature of any such province or colony, whether enacted before or after the passing of *The British North America Act*, 1867.

8. Proof of Proclamations &c.—Evidence of any proclamation, order, regulation or appointment, made or issued by the Governor General or by the Governor in Council, or by or under the authority of any Minister or head of any department of the Government of Canada, may be given in all or any of the modes hereinafter mentioned, that is to say:—

(*a*) By the production of a copy of the *Canada Gazette* or a volume of the Acts of the Parliament of Canada purporting to contain a copy of such proclamation, order, regulation, or appointment or a notice thereof;

(*b*) By the production of a copy of such proclamation, order,

(1) R. v. Bittle, 21 Ont. Rep. 605.

regulation or appointment, purporting to be printed by the Queen's Printer for Canada; and—

(*c.*) By the production, in the case of any proclamation, order, regulation or appointment made or issued by the Governor-General or by the Governor in Council, of a copy or extract purporting to be certified to be true by the Clerk, or assistant or acting Clerk of the Queen's Privy Council for Canada,—and in the case of any order, regulation or appointment made or issued by or under the authority of any such Minister or head of a department, by the production of a copy or extract purporting to be certified to be true by the Minister, or by his deputy or acting deputy, or by the secretary or acting secretary of the department over which he presides.

9. Evidence of any proclamation, order, regulation or appointment made or issued by a Lieutenant-Governor or Lieutenant-Governor in Council of any province, or by or under the authority of any member of the Executive Council, being the head of any department of the Government of the province, may be given, in all or any of the modes hereinafter mentioned, that is to say:—

(*a.*) By the production of a copy of the Official Gazette for the province, purporting to contain a copy of such proclamation, order, regulation or appointment or a notice thereof;

(*b.*) By the production of a copy of such proclamation, order, regulation or appointment, purporting to be printed by the Government or Queen's Printer for the province;

(*c.*) By the production of a copy or extract of such proclamation, order, regulation or appointment, purporting to be certified to be true by the clerk or assistant or acting clerk of the Executive Council, or by the head of any department of the Government of a province, or by his deputy or acting deputy, as the case may be.

10. Proof of judicial proceedings.—Evidence of any proceeding or record whatsoever of, in, or before any Court in the United Kingdom, or the Supreme or Exchequer Courts of Canada, or any Court, or before any Justice of the Peace or any coroner, in any province of Canada, or any Court in any British colony or possession, or any Court of record of the United States of America, or of any State of the United States of America, or of any other foreign country, may be made in any action or proceeding by an exemplification or certified copy thereof, purporting to be under the seal of such Court, or under the hand or seal of such Justice or Coroner, as the case may be, without any proof of the authenticity of such seal or of the signature of such Justice or Coroner or other proof whatever; and if any such Court, Justice or Coroner, has no seal, or so certifies then by a copy purporting to be certified under the signature of a Judge or presiding Magistrate of such Court or of such Justice or Coroner, without any proof of the authenticity of such signature or other proof whatsoever.

11. Imperial Proclamations, &c.—Imperial Proclamations, Orders in Council, treaties, orders, warrants, licenses, certificates, rules, regulations, or other Imperial official records, acts or documents may be proved (*a*) in the same manner as the same may from time to time be provable in any Court in England, or (*b*) by the production of a copy of the *Canada Gazette*, or a volume of the Acts of the Parliament of Canada purporting to contain a copy of the same or a notice thereof, or (*c*) by the production of a copy thereof, purporting to be printed by the Queen's Printer for Canada.

12. Official Documents.—In every case in which the original record could be received in evidence, a copy of any official or public document of Canada or of any province, purporting to be certified under the hand of the proper officer or person in whose custody such official or public document is placed, or a copy of a document, by-law rule, regulation or proceeding, or a copy of any entry in any register or other book of any municipal or other corporation, created by charter or statute of Canada or any province, purporting to be certified under the seal of the corporation, and the hand of the presiding officer, clerk or secretary thereof, shall be receivable in evidence without proof of the seal of the corporation, or of the signature or of the official character of the person or persons appearing to have signed the same, and without further proof thereof.

13. Copies of Public Books.—Where a book or other document is of so public a nature as to be admissible in evidence on its mere production from the proper custody, and no other statute exists which renders its contents provable by means of a copy, a copy thereof or extract therefrom shall be admissible in evidence in any Court of Justice, or before a person having, by law or by consent of parties, authority to hear, receive and examine evidence, provided it is proved that it is a copy or extract purporting to be certified to be true by the officer to whose custody the original has been entrusted.

14. Proof of hand writing not required.—No proof shall be 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 Documents in Canada Gazette.—All copies of official and other notices, advertisements and documents printed in the *Canada Gazette* shall be *prima facie* evidence of the originals, and of the contents thereof.

17. Copies of Entries in Government books.—A copy of any entry in any book kept in any department of the Government of Canada,

shall be received as evidence of such entry and of the matters, transactions and accounts therein recorded, if it is proved by the oath or affidavit of an officer of such department that such book was, at the time of the making of the entry, one of the ordinary books kept in such department, that the entry was made in the usual and ordinary course of business of such department, and that such copy is a true copy thereof.

18. Notarial Acts in Quebec.—Any document purporting to 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 adverse party.—No copy of any book or other document as provided in sections ten, twelve, thirteen, fourteen, seventeen and eighteen of this Act, shall be received in evidence upon any trial unless the party intending to produce the same has before the trial given to the party against whom it is intended to be produced reasonable notice of such intention. The reasonableness of the notice shall be determined by the Court or Judge, but the notice shall not in any case be less than ten days.

20. Construction of this Act.—The provisions of this Act shall be deemed to be in addition to and not in derogation of any powers of proving documents given by any existing statute or existing at law.

21. Application of Provincial Laws.—In all proceedings over which the Parliament of Canada has legislative authority, the laws of evidence in force in the province in which such proceedings are taken, including the laws of proof of service of any warrant, summons, subpoena or other document, shall, subject to the provisions of this and other Acts of the Parliament of Canada, apply to such proceedings.

OATHS AND AFFIRMATIONS.

22. Who may administer Oaths.—Every Court and Judge, and every person, having by law or consent of parties authority to hear and receive evidence, shall have power to administer an oath to every witness who is legally called to give evidence before that Court, Judge or person.

23. Affirmations instead of Oaths.—If a person called or desiring to give evidence, objects, on grounds of conscientious scruples, to take an oath or is objected to as incompetent to take an oath, such person may make the following affirmation :—

"I solemnly affirm that the evidence to be given by me shall be the truth, the whole truth, and nothing but the truth."

And, upon the person making such solemn affirmation, his evidence shall be taken and have the same effect as if taken under oath.

24. If a person required or desiring to make an affidavit or deposition in a proceeding, or on an occasion whereon or touching a matter respecting which an oath is required or is lawful, whether on taking office or otherwise, refuses or is unwilling to be sworn, on grounds of conscientious scruples the Court or Judge, or other officer or person qualified to take affidavits or depositions, shall permit such person instead of being sworn, to make his solemn affirmation in the words following, viz.: "I. A. B., do solemnly affirm," &c.; which solemn affirmation shall be of the same force and effect as if such person had taken an oath in the usual form.

2. Any witness whose evidence is admitted or who makes an affirmation under this or the next preceding section shall be liable to indictment and punishment for perjury in all respects as if he had been sworn.

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. (1)

STATUTORY DECLARATIONS.

26. Solemn 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.

27. Affidavits for Insurance Claims.—Any affidavit, affirmation or declaration required by any insurance company authorized by law to do business in Canada, in regard to any loss of, or injury to, person, property or life insured or assured therein, may be taken before any Commissioner authorized to take affidavits, or before any Justice of the Peace, or before any Notary public for any pro-

(1) See Art. 685 of the Code, and the case of R. v. Wenland, *cit*, at p. 637, *ante*.

vince 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. 18

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.

SCHEDULE ONE

OF THE

CRIMINAL CODE.

FORMS.

Forms A to J, of this Schedule are placed at the end of Part XLIV. (See pp. 543-548, *ante.*)

Forms K to Z, and AA to DD, are placed at the end of Part XLV. (See pp. 566-579, *ante.*)

Forms EE and FF, are placed at the end of Part XLVI. (See pp. 598 and 599, *ante.*)

Forms GG to JJ, are placed at the end of Part XLVIII. (See pp. 611-613, *ante.*)

Forms KK and LL, are placed under Part LI. (See pp. 662 and 663, *ante.*)

Forms MM to PP, are placed at the end of Part LIV. (See pp. 680-682, *ante.*)

Forms QQ to SS, are placed at the end of Part LV. (See pp. 690-692, *ante.*)

Forms TT and UU are placed at the end of Part LVI (See pp. 698 and 699, *ante.*)

Forms VV to ZZ, and AAA to SSS, are placed at the end of Part LVIII. (See pp. 728-746, *ante.*)

Form TTT, is placed at the end of Part LIX. (See p. 758, *ante.*)

Forms UUU to YYY, are placed under TITLE VIII. (See pp. 772-775, *ante.*)

SCHEDULE TWO

OF THE

CRIMINAL CODE.

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.
" 36	An Act respecting the Postal Service.	Secs. 79, to 81, 83, 84, 88, 90, 91, 96, 103, 107, 110 & 111.
" 38	An Act respecting Government Railways.	Sec. 62.
" 41	An Act respecting the Militia and Defence of Canada.	Sec. 109.
" 43	An Act respecting Indians.	Secs. 106 (ss.2) & 111.
" 65	An Act respecting Immigration and Immigrants.	Sec. 37.
" 81	An Act respecting Wrecks, Casualties and Salvage.	Secs. 35 to 37.
" 141	An Act respecting Extra-judicial oaths.	Secs. 1 & 2. (1)
" 145	An Act respecting Accessories.	The whole Act.
" 146	An Act respecting Treason and other offences against the Queen's authority.	The whole Act, except Secs. 6 & 7.
" 147	An Act respecting Riots, unlawful assemblies and breaches of the peace.	The whole Act.
" 148	An Act respecting the improper use of firearms and other weapons.	The whole Act, except Sec. 7.
" 149	An Act respecting the seizure of arms kept for dangerous purposes.	The whole Act, except Secs. 5 & 7.
" 150	An Act respecting Explosive Substances.	The whole Act.
" 152	An Act respecting the preservation of peace at Public Meetings.	The whole Act, except Secs. 1, 2 & 3.
" 153	An Act respecting Prize-fighting.	The whole Act, except Secs. 6, 7 & 10.
" 154	An Act respecting Perjury.	The whole Act, except Sec. 4.
" 155	An Act respecting Escapes and Rescues.	The whole Act.
" 156	An Act respecting offences against Religion.	The whole Act.
" 157	An Act respecting offences against Public Morals and Public Convenience.	The whole Act, except sec. 8 (ss. 4) (2)
" 158	An Act respecting Gaming-houses.	The whole Act, except Secs. 9 & 10.
" 159	An Act respecting Lotteries, Betting and Pool-selling.	The whole Act.
" 160	An Act respecting Gambling in public conveyances.	The whole Act.
" 161	An Act respecting offences relating to the Law of Marriage.	The whole Act.
" 162	An Act respecting offences against the Person.	The whole Act.
" 163	An Act respecting Libel.	The whole Act, except Secs. 6 & 7.
" 164	An Act respecting Larceny and similar offences.	The whole Act.
" 165	An Act respecting Forgery.	The whole Act.
" 167	An Act respecting offences relating to the Coin.	The whole Act, except Secs. 26 & 29 to 34 inclusive.
" 168	An Act respecting malicious injuries to Property.	The whole Act.
" 169	An Act respecting offences relating to the Army and Navy.	The whole Act, except Sec. 9.
" 171	An Act respecting the protection of Property of Seamen in the Navy.	The whole Act.
" 172	An Act respecting Cruelty to Animals.	The whole Act, except Sec. 7.

(1) See Sec. 28 of the Canada Evidence Act, 1893, p. 786, *ante*, which repeals the *whole* of Chapter 141, R.S.C.

(2) As amended by 56 Vic., c. 32.

SCHEDULE TWO.—ACTS REPEALED.—*Continued.*

ACTS REPEALED.		TITLE.	EXTENT OF REPEAL.
R. S. C.,	c. 173	An Act respecting Threats, Intimidation and other offences.	The whole Act, except Sec. 12 (ss. 5).
"	174	An Act respecting Procedure in Criminal Cases.	The whole Act.
"	176	An Act respecting the summary administration of Criminal Justice.	The whole Act, except Sec. 8, subsection 4.
"	177	An Act respecting Juvenile Offenders.	The whole Act.
"	178	An Act respecting summary proceedings before Justices of the Peace.	The whole Act.
"	179	An Act respecting Recognizances.	The whole Act.
"	180	An Act respecting Fines and Forfeitures.	The whole Act.
"	181	An Act respecting Punishments, Pardons and the Commutation of Sentences.	The whole Act.
"	185	An Act respecting Actions against persons administering the Criminal Law.	The whole Act.
50–51 V., c.	33	An Act to amend the Indian Act.	Sec. 11.
"	45	An Act respecting Public Stores.	The whole Act.
"	46	An Act respecting the conveyance of liquors on board Her Majesty's Ships in Canadian Waters.	The whole Act.
"	48	An Act to amend the Act respecting offences against Public Morals and Public 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, 16, 18, 22 & 23. (1)
"	42	An Act respecting gaming in Stocks and Merchandise.	The whole Act.
"	43	An Act further to amend the Law respecting Procedure in Criminal Cases.	The whole Act.
"	44	An Act further to amend *The Criminal Procedure Act*	The whole Act.
"	45	An Act to amend Chapter one hundred and seventy-eight of the Revised Statutes of Canada: *The Summary Convictions Act.*	The whole Act.
"	47	An Act to amend the Revised Statutes of Canada, Chapter one hundred and eighty-one, respecting Punishments, Pardons and the Commutation of Sentences.	The whole Act.
52 V., c.	22	An Act to amend the Revised Statutes, Chapter seventy-seven, respecting the safety of Ships.	Sec. 3.
"	25	An Act to amend the Revised Statutes respecting the North west Mounted Police Force.	Sec. 4.
"	40	An Act respecting Rules of Court in relation to Criminal Matters.	The whole Act.
"	41	An Act for the prevention and suppression of Combinations formed in restraint of Trade.	The whole Act, except Secs. 4 & 5.
"	42	An Act respecting Corrupt Practices in Municipal Affairs	The whole Act.
"	44	An Act to permit the conditional release of first offenders in certain cases.	The whole Act.
"	45	An Act to . mend *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, 6, 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.

(1) As amended by 56 Vic., c. 32.

APPENDIX

TO THE

CRIMINAL CODE.

ACTS AND PARTS OF ACTS WHICH ARE NOT AFFECTED BY THIS ACT.

R.S.C., CHAPTER 50.

An Act respecting the North-West Territories.

101. In this section—

(*a.*) The expression "improved arm" means and includes all arms except smooth bore shot guns;

(*b.*) The expression "ammunition" means fixed ammunition or ball cartridge.

2. Every person who, in the territories,—

(*a.*) Without the permission in writing (the proof of which shall be on him) of the Lieutenant-Governor, or of a commissioner appointed by him to give such permission, has in his possession or sells, exchanges, trades, barters or gives to, or with any person, any improved arm or ammunition, or—

(*b.*) Having such permission, sells, exchanges, trades, barters or gives any such arm or ammunition to any person not lawfully authorized to possess the same—

Shall, on summary conviction before a judge of the Supreme Court or two Justices of the Peace, be liable to a penalty not exceeding two hundred dollars, or to imprisonment for any term not exceeding six months, or to both.

3. All arms and ammunition which are in the possession of any person, or which are sold, exchanged, traded, bartered or given to or with any person in violation of this section, shall be forfeited to the Crown, and may be seized by any Constable or other Peace Officer; and any Judge of the Supreme Court or Justice of the Peace may issue a search warrant to search for and seize the same, as in the case of stolen goods.

4. The Governor in Council may, from time to time, make regulations respecting:—

(*a.*) The granting of permission to sell, exchange, trade, barter, give or possess arms or ammunition;

(*b.*) The fees to be taken in respect thereof;

(*c*) The returns to be made respecting permissions granted; and—

(*d.*) The disposition to be made of forfeited arms and ammunition.

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

6. The Governor in Council may, from time to time declare by proclamation that upon and after a day therein named this section shall be in force in the territories, or in any place or places therein in such proclamation designated; and upon and after such day but not before, the provisions of this section shall take effect and be in force accordingly.

7. The Governor in Council may, in like manner, from time to time, declare this section to be no longer in force in any such place or places, and may again, from time to time, declare it to be in force therein.

8. All Courts, Judges and Justices of the Peace shall take judicial notice of any such proclamation

R.S.C., CHAPTER 146.

An Act respecting Treason and other Offences against the Queen's Authority.

6. If any person, being a citizen or subject of any foreign state or country at peace with Her Majesty, is or continues in arms against Her Majesty, within Canada, or commits any act of hostility therein, or enters Canada with design or intent to levy war against Her Majesty, or to commit any felony therein, for which any person would, in Canada, be liable to suffer death, the Governor General may order the assembling of a militia general court-martial for the trial of such person, under *The Militia Act*; and upon being found guilty by such court-martial of offending against the provisions of this section, such person shall be sentenced by such court-martial to suffer death, or such other punishment as the court awards.

7. Every subject of Her Majesty, within Canada, who levies war against Her Majesty, in company with any of the subjects or citizens of any foreign state or country then at peace with Her Majesty, or enters Canada in company with any such subjects or citizens with intent to levy war on Her Majesty, or to commit any such act of felony as aforesaid, or who, with the design or intent to aid and assist, joins himself to any person or persons whomsoever, whether subjects or aliens, who have entered Canada with design or intent to levy war on Her Majesty, or to commit any such felony within the same, may be tried and punished by a militia court-martial, in the same manner as any citizen or subject of a foreign state or country at peace with Her Majesty may be tried and punished under the next preceding section.

R.S.C., CHAPTER 148.

An Act respecting the improper use of Firearms and other Weapons.

7. The Court or Justice before whom any person is convicted of any offence against the provisions of the preceding sections, shall impound the weapon for carrying which such person is convicted, and if the weapon is not a pistol, shall cause it to be destroyed; and if the weapon is a pistol, the Court or Justice shall cause it to be handed over to the corporation of the municipality in which the conviction takes place, for the public uses of such corporation.

2. If the conviction takes place where there is no municipality, the pistol shall be handed over to the Lieutenant-Governor of the province in which the conviction takes place, for the public uses thereof in connection with the administration of justice therein.

R.S.C., CHAPTER 149.

An Act respecting the seizure of Arms kept for dangerous purposes.

5. All Justices of the Peace in and for any district, county, city, town or place, in Canada, shall have concurrent jurisdiction as Justices of the Peace, with the Justices of any other district, county, city, town or place, in all cases with respect to the carrying into execution the provisions of this Act, and with respect to all matters and things relating to the preservation of the public peace under this Act, as fully and effectually as if each of such Justices was in the commission of the peace, or was *ex officio* a Justice of the Peace for each of such districts, counties, cities, towns or places.

7. The Governor in Council may, from time to time, by proclamation, suspend the operation of this Act in any province of Canada or in any particular district, county or locality specified in the proclamation; and from and after the period specified in any such proclamation, the powers given by this Act shall be suspended in such province, district, county or locality; but nothing herein contained shall prevent the Governor in Council from again declaring, by proclamation, that any such province, district, county or locality shall be again subject to this Act and the powers hereby given, and upon such proclamation this Act shall be revived and in force accordingly.

R.S.C., CHAPTER 151.

An Act respecting the Preservation of Peace in the vicinity of Public Works.

INTERPRETATION.

1. In this Act, unless the context otherwise requires,—

(*a.*) The expression "this Act" means such section or sections thereof as are in force, by virtue of any proclamation, in the place or places with reference to which the Act is to be construed and applied;

(*b.*) The expression "commissioner" means a commissioner under this Act;

(*c.*) The expression "weapon" includes any gun or other firearm, or air-gun or any part thereof, or any sword, swordblade, bayonet, pike-head, spear, spear-head, dirk, dagger, or other instrument intended for cutting or stabbing, or any steel or metal knuckles, or other deadly or dangerous weapon, and any instrument or thing intended to be used as a weapon, and all ammunition which may be used with or for any weapon;

(*d.*) The expression "intoxicating liquor" means and includes any alcoholic, spirituous, vinous, fermented or other intoxicating liquor, or any mixed liquor, a part of which is spirituous or vinous, fermented or otherwise intoxicating;

(*e.*) The expression "district, county or place," includes any division of any province for the purposes of the administration of justice in the matter to which the context relates;

(*f.*) The expression "public work" means and includes any railway, canal, road, bridge or other work of any kind, and any mining operation constructed or carried on by the Government of Canada or of any province of Canada, or by any municipal corporation, or by any incorporated company, or by private enterprise.

PROCLAMATION.

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.

2. The Governor in Council may, in like manner, from time to time, declare this Act, or any section or sections thereof, to be no longer in force in any such place or places,—and may again, from time to time, declare this Act, or any section or sections thereof, to be in force therein.

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

4. All Courts, Magistrates and Justices of the Peace shall take judicial notice of every such proclamation.

WEAPONS

3. On or before the day named in such proclamation, every person employed on or about any public work, to which the same relates, shall bring and deliver up, to some Commissioner or Officer appointed for the purposes of this Act, every weapon in his possession, and shall obtain from such Commissioner or Officer a receipt for the same.

4. Every weapon found in the possession of any person employed, as aforesaid, after the day named in any proclamation and within the limits designated in such proclamation, may be seized by any Justice of the Peace, Commissioner, Constable or other Peace Officer,—and shall be forfeited to the use of Her Majesty.

5. Every one employed upon or about any public work, within the place or places in which this Act is then in force, who, upon or after the day named in such proclamation, keeps or has in his possession or under his care or control, within any such place, any weapon, shall incur a penalty not exceeding four dollars and not less than two dollars for every such weapon found in his possession.

6. Every one who, for the purpose of defeating this Act, receives or conceals or aids in receiving or concealing, or procures to be received or concealed, within any place in which this Act is at the time in force, any weapon belonging to or in the custody of any person employed on or about any public work, shall incur a penalty not exceeding one hundred dollars and not less than forty dollars, and a moiety of such penalty shall belong to the informer and the other moiety to Her Majesty, for the public uses of Canada.

7. Any Commissioner or Justice of the Peace, Constable or Peace Officer, or any person acting under a warrant, in aid of any Constable or Peace Officer, may arrest and detain any person employed on any public work, found carrying any weapon, within any place in which this Act is, at the time, in force, at such time and in such manner as, in the judgment of such Commissioner, Justice of the Peace, Constable or Peace Officer, or person acting under a warrant, affords just cause of suspicion that it is carried for purposes dangerous to the public peace; and every one so employed, who so carries any such weapon, is guilty of a misdemeanor,—and the Justice of the Peace or Commissioner arresting such person, or before whom he is brought under such a warrant, may commit him for trial for a misdemeanour, unless he gives sufficient bail for his appear

ance at the next term or sitting of the Court before which the offence can be tried, to answer to any indictment to be then preferred against him.

8. Any Commissioner appointed under this Act, or any Justice of the Peace having authority within the place in which this Act is at the time in force, upon the oath of a credible witness that he believes that any weapon is in the possession of any person or in any house or place contrary to the provisions of this Act, may issue his warrant to any Constable or Peace Officer to search for and seize the same,—and he, or any person in his aid, may search for and seize the same in the possession of any person, or in any such house or place.

9. If admission to any such house or place is refused after demand, such Constable or Peace Officer, and any person in his aid, may enter the same by force by day or by night, and seize any such weapon and deliver it to such Commissioner; and unless the person in whose possession or in whose house or premises the same is found, within four days next after the seizure, proves to the satisfaction of such Commissioner or Justice of the Peace that the weapon so seized was not in his possession or in his house or place contrary to the meaning of this Act, such weapon shall be forfeited to the use of Her Majesty.

10. All weapons declared forfeited under this Act shall be sold or destroyed under the direction of the Commissioner by whom or by whose authority the same are seized, and the proceeds of such sale, after deducting necessary expenses, shall be received by such Commissioner and paid over by him to the Minister of Finance and Receiver-General, for the public uses of Canada.

11. Whenever this Act ceases to be in force within the place where any weapon has been delivered and detained in pursuance thereof, or whenever the owner or person lawfully entitled to any such weapon satisfies the Commissioner that he is about to remove immediately from the limits within which this Act is at the time in force, the Commissioner may deliver up to the owner or person authorized to receive the same, any such weapon, on production of the receipt given for it.

12. Every Commissioner under this Act shall make a monthly return to the Secretary of State of all weapons delivered to him, and by him detained under this Act.

INTOXICATING LIQUOR.

13. Upon and after the day named in such proclamation and during such period as such proclamation remains in force, no person shall, at any place within the limits specified in such proclamation, sell, barter or, directly or indirectly, for any matter, thing, profit or reward, exchange, supply or dispose of, any intoxicating liquor; nor expose, keep or have in possession any intoxicating liquor intended to be dealt with in any such way.

2. The provisions of this section shall not extend to any person selling intoxicating liquor by wholesale, and not retailing the same, if such person is a licensed distiller or brewer.

14. Every one who, by himself, his clerk, servant, agent or other person, violates any of the provisions of the next preceding section, is guilty of an offence against this Act, and, on a first conviction, shall be liable to a penalty of forty dollars and costs, and, in default of payment, to imprisonment for a term not exceeding three months,—and on every subsequent conviction, to the said penalty and the said imprisonment in default of payment, and also to further imprisonment for a term not exceeding six months.

15. Every clerk, servant, agent or other person who, being in the employment of, or on the premises of another person, violates or assists in violating any of the provisions of the thirteenth section of this Act, for the person in

whose employment or on whose premises he is, shall be equally guilty with the principal offender, and shall be liable to the penalties mentioned in the next preceding section.

16. If any person makes oath or affirmation before any Commissioner or Justice of the Peace, that he has reason to believe, and does believe that any intoxicating liquor with respect to which a violation of the provisions of the thirteenth section of this Act has been committed or is intended to be committed is, within the limits specified in any proclamation by which this Act has been proclaimed to be in force, on board of any steam-boat, vessel, boat, canoe, raft or other craft, or in or about any building or premises, or in any carriage, vehicle or other conveyance, or at any place, the Commissioner or Justice of the Peace shall issue a search warrant to any Sheriff, Police Officer, Constable or Bailiff who shall forthwith proceed to search the steam-boat, vessel, boat, canoe, raft, other craft, building, premises, carriage, vehicle, conveyance or place described in such search warrant: and if any intoxicating liquor is found therein or thereon the person executing such search warrant shall seize the intoxicating liquor and the barrels, casks, jars, bottles or other packages in which it is contained and shall keep it and them secure until final action is had thereon.

2. No dwelling-house in which, or in part of which or on the premises whereof, a shop or a bar is not kept, shall be searched, unless the said informant also makes oath or affirmation that some offence in violation of the provisions of the thirteenth section of this Act has been committed therein or therefrom within one month next preceding the time of making his said information for a search warrant.

3. The owner, keeper or person in possession of the intoxicating liquor so seized, if he is known to the officer seizing the same, shall be summoned forthwith by the Commissioner or Justice of the Peace who issued the search warrant to appear before such Commissioner or Justice of the Peace; and if he fails so to appear, or if it appears to the satisfaction of such Commissioner or Justice of the Peace that a violation of the provisions of the thirteenth section of this Act has been committed or is intended to be committed, with respect to such intoxicating liquor, it shall be declared forfeited, with any package in which it is contained, and shall be destroyed by authority of the written order to that effect of such Commissioner or Justice, and in his presence or in the presence of some person appointed by him to witness the destruction thereof; and the Commissioner or Justice or the person so appointed by him, and the officer by whom the said intoxicating liquor has been destroyed, shall jointly attest, in writing upon the back of the said order, the fact that it has been destroyed.

4. The owner, keeper or person in possession of any intoxicating liquor seized and forfeited under the provisions of this section may be convicted of an offence against the thirteenth section of this Act without any further information laid or trial had, and shall be liable to the penalties mentioned in the fourteenth section of this Act.

17. If the owner, keeper or possessor of intoxicating liquor seized under the next preceding section is unknown to the officer seizing the same, it shall not be condemned and destroyed until the fact of such seizure, with the number and description of the packages, as near as may be, has been advertised for two weeks, by posting up a written or a printed notice and description thereof, in at least three public places of the place where it was seized.

2. If it is proved within such two weeks, to the satisfaction of the Commissioner or Justice by whose authority such intoxicating liquor was seized, that with respect to such intoxicating liquor no violation of the provisions of the thirteenth section of this Act has been committed or is intended to be committed it shall not be destroyed, but shall be delivered to the owner, who shall give his receipt therefor in writing upon the back of the search warrant, which shall

be returned to the Commissioner or Justice who issued the same; but if, after such advertisement as aforesaid, it appears to such Commissioner or Justice that a violation of the provisions of the thirteenth section of this Act has been committed or is intended to be committed, then such intoxicating liquor, with any package in which it is contained, shall be forfeited and destroyed, according to the provisions of the next preceding section.

18. Any payment or compensation, whether in money or securities for money, labour or property of any kind, for intoxicating liquor sold, bartered, exchanged, supplied or disposed of, contrary to the provisions of the thirteenth section of this Act, shall be held to have been criminally received without consideration, and against law, equity and good conscience, and the amount or value thereof may be recovered from the receiver by the person making, paying or furnishing such payment or compensation; and all sales, transfers, conveyances, liens and securities of every kind, which either in whole or in part have been made or given for or on account of intoxicating liquor sold, bartered, exchanged, supplied or disposed of contrary to the provisions of the thirteenth section of this Act, shall be void against all persons, and no right shall be acquired thereby; and no action of any kind shall be maintened, either in whole or in part, for or on account of intoxicating liquor sold, bartered, exchanged, supplied or disposed of, contrary to the provisions of the said section.

19. In any prosecution under this Act for any offence with respect to intoxicating liquor, it shall not be necessary that any witness should depose directly to the precise description of the liquor with respect to which the offence has been committed, or to the precise consideration therefor, or to the fact of the offence having been committed with his participation or to his own personal and certain knowledge; but the Commissioner or Justice of the Peace trying the case, so soon as it appears to him that the circumstances in evidence sufficiently establish the offence complained of, shall put the defendant on his defence, and in default of such evidence being rebutted, shall convict the defendant accordingly.

GENERAL PROVISIONS.

20. Any Commissioner or Justice of the Peace may hear and determine, in a summary manner, any case arising within his jurisdiction under this Act; and every person making complaint against any other person for violating this Act, or any provision thereof, before such Commissioner or Justice, may be admitted as a witness; and the Commissioner or Justice of the Peace before whom the examination or trial is had, may, if he thinks there was probable cause for the prosecution, order that the defendant shall not recover costs, although the prosecution fails.

21. All the provisions of every law respecting the duties of Justices of the Peace in relation to summary convictions, and orders and to appeals from such convictions, and for the protection of Justices of the Peace when acting as such or to facilitate proceedings by or before them in matters relating to summary convictions and orders, shall, in so far as they are not inconsistent with this Act, apply to every Commissioner or Justice of the Peace mentioned in this Act or empowered to try offenders against this Act; and every such Commissioner shall be deemed a Justice of the Peace within the meaning of any such law, whether he is or is not a Justice of the Peace for other purposes.

22. On the trial of any proceeding, matter or question under this Act, the person opposing or defending, and the wife or husband of such person, shall be competent to give evidence.

23. No action or other proceeding, warrant, judgment, order or other instrument or writing, authorized by this Act or necessary to carry out its provisions, shall be held void or be allowed to fail for defect of form.

24. Every action brought against any Commissioner or Justice of the Peace, Constable, Peace Officer or other person, for anything done in persuance of this Act, shall be commenced within six months next after the alleged cause of action arises; and the venue shall be laid or the action instituted in the district or county or place where the cause of action arose; and the defendant may plead the general issue and give this Act and the special matter in evidence; and if such action is brought after the time limited, or the venue is laid or the action brought in any other district, county or place than as above prescribed, the judgment or verdict shall be given for the defendant; and in such case, or if the judgment or verdict is given for the defendant on the merits, or if the plaintiff becomes nonsuited or discontinues after appearance is entered, or has judgment rendered against him on demurrer, the defendant shall be entitled to recover double costs.

R.S.C., CHAPTER 152.

An Act respecting the Preservation of Peace at Public Meetings.

1. Any Justice of the Peace within whose jurisdiction any public meeting is appointed to be held, may demand, have and take of and from any person attending such meeting, or on his way to attend the same, any offensive weapon, such as firearms, swords, staves, bludgeons, or the like, with which any such person is so armed, or which any such person has in his possession; and every such person who, upon such demand, declines or refuses to deliver up, peaceably and quietly, to such Justice of the Peace, any such offensive weapon as aforesaid, is guilty of a misdemeanour, and such Justice may thereupon record the refusal of such person to deliver up such weapon, and adjudge him to pay a penalty not exceeding eight dollars,—which penalty shall be levied in like manner as penalties are levied under the *Act respecting summary proceedings before Justices of the Peace*, or such person may be proceeded against by indictment or information, as in other cases of misdemeanour; but such conviction shall not interfere with the power of such Justice, or any other Justice of the Peace, to take such weapon, or cause the same to be taken from such person, without his consent and against his will, by such force as is necessary for that purpose.

2. Upon reasonable request to any Justice of the Peace, to whom any such weapon has been peaceably and quietly delivered as aforesaid, made on the day next after the meeting has finally dispersed, and not before, such weapon shall, if of the value of one dollar or upwards, be returned by such Justice of the Peace to the person from whom the same was received.

3. No such Justice of the Peace shall be held liable to return any such weapon, or make good the value thereof, if the same, by unavoidable accident, has been actually destroyed or lost out of the possession of such Justice without his wilful default.

R.S.C., CHAPTER 153.

An Act respecting Prize-fighting.

6. If, at any time, the Sheriff of any county, place or district in Canada, any Chief of Police, any Police Officer, or any Constable, or other Peace Officer, has reason to believe that any person within his bailiwick or jurisdiction is about to engage as principal in any prize-fight within Canada, he shall forthwith arrest such person and take him before some person having authority to try offences against this Act, and shall forthwith make complaint in that behalf, upon oath, before such person; and thereupon such person shall inquire into the charge

and if he is satisfied that the person so brought before him was, at the time of his arrest, about to engage as a principal in a prize-fight, he shall require the accused to enter into a recognizance, with sufficient sureties, in a sum not exceeding five thousand dollars and not less than one thousand dollars, conditioned that the accused will not engage in any such fight within one year from and after the date of such arrest; and in default of such recognizance, the person before whom the accused has been brought shall commit the accused to the 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.

R.S.C., CHAPTER 154.

An Act respecting Perjury.

4. Any Judge of any Court of Record, or any Commissioner before whom any inquiry or trial is held, and which he is by law required or authorized to hold, may, if it appears to him that any person has been guilty of wilful and corrupt perjury in any evidence given, or in any affidavit, affirmation, declaration, deposition, examination answer or other proceeding made or taken before him, direct such person to be prosecuted for such perjury, if there appears to such Judge or Commissioner a reasonable cause for such prosecution,—and may commit such person so directed to be prosecuted until the next term, sittings or session of any Court having power to try for perjury, in the jurisdiction within which such perjury was committed, or permit such person to enter into a recognizance, with one or more sufficient sureties, conditioned for the appearance of such person at such next term, sittings or session, and that he will then surrender and take his trial and not depart the Court without leave,—and may require any person, such Judge or Commissioner thinks fit, to enter into a recognizance conditioned to prosecute or give evidence against such person so directed to be prosecuted as aforesaid.

R.S.C., CHAPTER 157.

An Act respecting Offences against Public Morals and Public Convenience.

8. . . . . . .

(4) If provision is made therefor by the laws of the province in which the conviction takes place, any such loose, idle or disorderly person may, instead of being committed to the common gaol or other public prison, be committed to any house of industry or correction, alms-house, work house or reformatory prison.

R.S.C., CHAPTER 167.

An Act respecting Offences relating to the Coin.

29. 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.

30. 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.

31. 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.

32. Any Officer of Her Majesty's Customs may seize any copper or brass coin imported or attempted to be imported into Canada in violation of this Act, and may detain the same as forfeited, to await the disposal of the Governor General, for the public uses of Canada.

33. 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.

34. A moiety of any of the penalties imposed by any of the five sections next preceding, but not the copper or brass coins forfeited under the provisions thereof, shall belong to the informer or person who sues for the same, and the other moiety shall belong to Her Majesty, for the public uses of Canada.

R.S.C., CHAPTER 169.

An Act respecting offences relating to the Army and Navy.

9. One moiety of the amount of any penalty recovered under any of the preceding sections shall be paid over to the prosecutor or person by whose means the offender has been convicted, and the other moiety shall belong to the Crown.

R.S.C., CHAPTER 172.

An Act respecting Cruelty to Animals.

7. Every pecuniary penalty recovered with respect to any such offence shall be applied in the following manner, that is to say: one moiety thereof to the corporation of the city, town, village, township, parish, or place in which the offence was committed, and the moiety, with full costs, to the person who informed and prosecuted for the same, or to such other person as to the Justices of the Peace seems proper.

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51 VICT., CHAPTER 41.

An Act to amend the law relating to fraudulent marks on Merchandise.

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 subsections next preceding shall apply to any city or place in any foreign state or country; and after the publication in the *Canada Gazette* of the Order in Council made in that behalf, such provisions shall apply to such city or place in like manner as they apply to any place in the United Kingdom or in Canada, and may be enforced accordingly.

4. The Governor in Council may, from time to time, make regulations either general or special, respecting the detention and seizure of goods, the importation of which is prohibited by this section, and the conditions, if any, to be fulfilled before such detention and seizure, and may, by such regulations, determine the information, notices and security to be given, and the evidence necessary for any of the purposes of this section, and the mode of verification of such evidence.

5. The regulations may provide for the reimbursing by the informant to the Minister of Customs of all expenses and damages incurred in respect of any detention made on his information, and of any proceedings consequent upon such detention.

6. Such regulations may apply to all goods the importation of which is prohibited by this section, or different regulations may be made respecting different classes of such goods or of offences in relation to such goods.

7. All such regulations shall be published in the *Canada Gazette* and shall have force and effect from the date of such publication.

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.

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52 VICT., CHAPTER 41.

An Act for the Prevention and Suppression of Combinations formed in restraint of Trade.

4. Where an indictment is found against any person for offences provided against in this Act, the defendant or person accused shall have the option to be tried before the Judge presiding at the Court at which such indictment is found, or the Judge presiding at any subsequent sitting of such Court, or at any Court where the indictment comes on for trial, without the intervention of a Jury; and in the event of such option being exercised the proceedings subsequent thereto shall be regulated, in so far as may be applicable, by *The Speedy Trials Act*.

5. An appeal shall lie from any conviction under this Act by the Judge without the intervention of a Jury to the highest Court of Appeal in criminal matters in the province where such conviction shall have been made, upon all issues of law and fact; and the evidence taken in the trial shall form part of the record in appeal, and for that purpose the Court before which the case is tried shall take note of the evidence and of all legal objections thereto.

53 VICT., CHAPTER 37.

An Act further to amend the Criminal Law.

ESCAPES AND RESCUES.

1. Section nine of chapter one hundred and fifty-five of the Revised Statutes of Canada, *An Act respecting Escapes and Rescues*, is hereby repealed and the following section is substituted therefor :—

"**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 misdemeanor, 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 shown to the satisfaction of such Magistrate, he may order the offender to be removed to and to be kept imprisoned, for the remainder of his original term of imprisonment or detention, in any reformatory prison or reformatory school, in which by law such offender may be imprisoned for a misdemeanor,—and when there is no such reformatory prison or reformatory school, may order the offender to be removed to and to be so kept imprisoned in any other place of imprisonment to which the offender may be lawfully committed ;

"(*c.*) And in any case mentioned in the preceding paragraphs (*a*) and (*b*) of this subsection, or if the term of his imprisonment or detention has expired, the Magistrate may, after conviction, sentence the offender to such additional term of imprisonment or detention, as the case may be, not exceeding one year, as to such Magistrate seems a proper punishment for the escape or attempt to escape"

2. Every one who, being sentenced to imprisonment or detention in, or being ordered to be detained in any industrial refuge, industrial home or industrial school, by reason of incorrigible or vicious conduct, or with reference to the general discipline of the institution, is beyond the control of the Officer in charge of such institution, is guilty of a misdemeanour, and may be dealt with as follows :—

(*a.*) The offender may, at any time before the expiration of his term of imprisonment or detention, be brought without warrant before any Magistrate, if the Officer in charge of such refuge, home or school certifies in writing that the removal of such offender to a place of stricter imprisonment is desirable, and if the governing body of such refuge, home or school applies for such removal, and if sufficient cause therefor is shown to the satisfaction of such Magistrate, he may order the offender to be removed to and to be kept imprisoned, for the remainder of his original term of imprisonment or detention, in any reformatory prison or reformatory school in which by law such offender may be imprisoned for a misdemeanour; and when there is no such reformatory prison or school the Magistrate may order the offender to be removed to and to be so kept

imprisoned in any other place of imprisonment to which the offender may be lawfully committed;

(*b*) The Magistrate may, after conviction, sentence the offender to such additional term of imprisonment, not exceeding one year, as to such Magistrate seems a proper punishment for the incorrigible conduct of the offender.

PUBLIC AND REFORMATORY PRISONS.

Certified Industrial School, Ontario.

32. The Governor General, by warrant under his hand, may at any time in his discretion (the consent of the Provincial Secretary of Ontario having been first obtained), cause any boy who is imprisoned in a reformatory or gaol in that province, under sentence for an offence against a law of Canada, and who is certified by the Court, Judge or Magistrate by whom he was tried to have been, in the opinion of such Court, Judge or Magistrate, at the time of his trial, of or under the age of thirteen years, to be transferred for the remainder of his term of imprisonment to a certified industrial school in the province.

33. Where, under any law of Canada, any boy is convicted in Ontario, whether summarily or otherwise, any offence punishable by imprisonment, and the Court, Judge, Stipendiary or Police Magistrate may sentence such boy to imprisonment in a certified industrial school for any term not exceeding five years and not less than two years; Provided, that no boy shall be sentenced to any such school unless public notice has been given in the *Ontario Gazette* and has not been countermanded, that such school is ready to receive and maintain boys sentenced under laws of the Dominion; Provided also, that no such boy shall be detained in any certified industrial school beyond the age of seventeen years.

Halifax Industrial School.

34. Section sixty-one of chapter one hundred and eighty-three of the Revised Statutes, intituled: *An Act respecting Public and Reformatory Prisons*, is hereby repealed and the following substituted therefor:—

"**61.** Whenever any boy, who is a Protestant and a minor apparently under the age of sixteen years, is convicted in Nova Scotia of any offence for which by law he is liable to imprisonment, the Judge, Stipendiary Magistrate, Justice or Justices by whom he is so convicted may sentence such boy to be detained in the Halifax Industrial School for any term not exceeding five years, and not less than two years."

35. Section sixty-two of the said Act is hereby repealed and the following substituted therefor:—

"**62.** No such sentence shall be pronounced unless or until provision has been made by the municipality within which such conviction is had, out of its funds, for the support of boys so sentenced, at the rate of not less than sixty dollars per annum for each boy."

St. Patrick's Home, Halifax.

36. Section sixty-five of the said Act is hereby repealed and the following substituted therefor:—

"**65.** Whenever any boy, who is a Roman Catholic and apparently under the age of sixteen years, is convicted in Nova Scotia of any offence for which by law he is liable to imprisonment, the Judge, Stipendiary Magistrate, Justice or Justices by whom he is so convicted may sentence such boy to be

detained in Saint Patrick's Home at Halifax for any term not exceeding five years, and not less than two years; but no such sentence shall be pronounced unless or until provision has been made by the municipality within which such conviction is had, out of its funds, for the support of boys so sentenced, at the rate of not less than sixty dollars per annum for each boy."

37. Section sixty-six of the said Act is hereby repealed and the following substituted therefor:—

"**66.** The superintendent, or head of the said home, may at any time notify the Mayor, Warden or other Chief Magistrate of any municipality, that no prisoners, beyond those already under sentence in such home, will be received therein; and after such notification no such sentence shall be pronounced in such municipality until notice has been received by such Mayor, Warden or Chief Magistrate, from the said superintendent or head, that prisoners will again be received in the said home."

38. The six preceding sections shall not, nor shall any of them, come into force until the same shall have been proclaimed by the Governor in Council.

39. The said Act is hereby further amended by adding at the end thereof the following sections.

PART VI.

"MANITOBA.

"*Manitoba Reformatory for Boys.*

"**78.** If any boy, who, at the time of his trial, appears to the Court to be under the age of sixteen years, is convicted of any offence for which a sentence of imprisonment for a period of three months or longer, but less than five years, may be imposed upon an adult convicted of the like offence, and the Court before which such boy is convicted is satisfied that a due regard for the material and moral welfare of the boy manifestly requires that he should be committed to the Manitoba reformatory for boys, then such Court may sentence the boy to be imprisoned in such reformatory for such term as the Court thinks fit, not being greater than the term of imprisonment which could be imposed upon an adult for the like offence, and may further sentence such boy to be kept in such reformatory for an indefinite time after the expiration of such fixed term; Provided, that the whole period of confinement in such reformatory shall not exceed five years from the commencement of his imprisonment.

"**79.** If any boy, apparently under the age of sixteen years, is convicted of any offence, punishable by law on summary conviction, and thereupon is sentenced and committed to prison in any common gaol for a period of fourteen days at the least, any Judge of any one of the Superior Courts, or any Judge of a County Court, in any case occurring within his county, may examine and inquire into the circumstances of such case and conviction and when he considers the material and moral welfare of the boy requires such sentence, he may, as an additional sentence for such offence, sentence such boy to be sent either forthwith or at the expiration of his imprisonment in such gaol, to such reformatory, to be there detained for the purpose of his industrial and moral education for an indefinite period, not exceeding in the whole five years, from the commencement of his imprisonment in the common gaol.

"**80.** Every boy so sentenced shall be detained in such reformatory until the expiration of the fixed term, if any, of his sentence, unless sooner discharged by lawful authority, and thereafter shall, subject to the provisions hereof and to any regulations made as hereinafter provided, be detained in

such reformatory for a period not to exceed five years from the commencement of his imprisonment, for the purpose of his industrial and moral education.

"**81.** A copy of the sentence of the Court, duly certified by the proper Officer, or the warrant or order of the Judge or other Magistrate by whom any boy is sentenced to confinement in such reformatory, shall be a sufficient authority to the Sheriff, Constable or other Officer who is directed, verbally or otherwise, so to do, to convey such boy to the common gaol of the county where such sentence is pronounced, and for the gaoler of such gaol to receive and detain such boy, until some person, lawfully authorized, requires the delivery of such boy for removal to the reformatory.

"**82.** If any boy sentenced to be confined in such reformatory is in such a weak state of health that he cannot safely or conveniently be removed to the reformatory, he may be detained in the common gaol or other place of confinement in which he is, until he is sufficiently recovered to be safely and conveniently removed to the reformatory.

"**83.** No boy shall be discharged from such reformatory at the termination of his term of confinement, if then labouring under any contagious or infectious disease, or under any acute or dangerous illness, but he shall be permitted to remain in such reformatory until he recovers from such disease or illness: Provided that any boy remaining in such reformatory for any such cause shall be under the same discipline and control as if his term was still unexpired.

"**84.** Any Sheriff or other person having the custody of any offender sentenced to imprisonment in the said reformatory, may detain the offender in the common gaol of the county or district in which such offender is sentenced, or other place of confinement in which such offender is, until some person lawfully authorized in that behalf requires such offender's delivery for the purpose of being conveyed to such reformatory.

"**85.** Whenever the time of any offender's sentence in such reformatory, under any law within the legislative authority of the Parliament of Canada, expires on a Sunday, such offender shall be discharged on the previous Saturday, unless such offender desires to remain until the Monday following."

40. The provisions of this Act in respect to the Manitoba reformatory for boys shall not come into force until the same shall have been proclaimed by the Governor in Council.

EXTRA APPENDIX.

HOUSE OF COMMONS DEBATES, 1892.

ON THE

CRIMINAL CODE.

The following copy of the Debates is taken from the Official Report; and although, in condensing the matter so as to keep it within the limits of the present work, a few changes in the phraseology could not be avoided, the *Hansard* text has, for the most part, been closely adhered to.

TUESDAY, 12th April 1892.

Sir JOHN THOMPSON moved the second reading of Bill (No. 7) respecting the Criminal Law. He said: The objects of the Bill are stated very tersely in one passage of the Report of the Royal Commission which investigated the subject of the Criminal Law in England, in defining the effort at codification in a similar Bill in Great Britain in these words:

"It is a reduction of the existing law to an orderly written system, freed from needless technicalties, obscurities, and other defects which the experience of its administration has disclosed. It aims at the reduction to a system of that kind of substantive law relating to crimes and the law of procedure, both as to indictable offences and as to summary convictions."

The Bill is founded on the English draft code prepared by the Royal Commission in 1880, on Stephens' Digest of the Criminal Law, (the edition of 1887), Burbidge's Digest of the Canadian Criminal Law of 1889, and the Canadian Statutory Law. The efforts at the reduction of the Criminal Law of England into this shape have been carried on for nearly sixty years, and, although not yet perfected by statute, those efforts have given us immense help in simplifying and reducing, into a system of this kind, our law relating to criminal matters and criminal procedure.

As regards evidence I propose, immediately after recess, to introduce a Bill relating to evidence in all matters controlled by this Parliament.

The present Bill aims at a codification of both common and statutory law; but it does not aim at completely superseding the common law, while it does aim at completely superseding the statutory law relating to crimes.

The common law will still exist and be referred to; and in that respect the Code will have the elasticity so much desired by those who are opposed to codification on general principles.

Substantially, the Bill follows the existing law.

It purposes, however, to abolish the distinction between principals and accessories before the fact.

It aims at making punishments for various crimes of something like the same grade more uniform.

It discontinues the use of the words, "*malice*" and "*maliciously*" now so common both in statutory and common law, and causing considerable uncertainty and ambiguity in the administration of the criminal law by Juries. A few lines from the report of the Royal Commission in England will explain that proposition. They say:—

"We have avoided the use of the word "*malice*" throughout the Draft Code, because there is a considerable difference between its popular and its legal meaning. For example, the expression "*malice aforethought*," in reference to murder, has received judicial interpretation which makes its use positively misleading."

The term "*malice*" was used in a legal sense quite contrary to the popular sense. Nobody in practice understood it but the lawyers. The first labor of the Judge was to get the Jury to dispense altogether in their minds with the sense which everybody had put upon the words "*malice aforethought*" and to tell them that what the indictment said about *malice* did not mean what everybody, in creation, but the learned few, supposed it to mean. The Bill defines murder. and in cases of doubt settles what murder is. With that view it defines provocation, which may reduce a homicide to manslaughter.

It deals with the offence of bigamy principally for the purpose of removing existing doubts as to the actual state of the law with regard to the period during which belief of the decease of the other party to the original marriage may be an exoneration; and following the principle recommended by the Royal Commission, it makes *bonâ fide* and *well grounded* belief in the death of the former husband or wife absolutely necessary, in order to relieve from the crime of bigamy upon such a ground of defence. (1)

The Bill proposes to abolish the term "LARCENY" and to adopt the term "THEFT" instead, as was strongly recommended by the Royal Commission in England. (2)

(1) See Article 275 p. 196, *ante*.

(2) See Remarks of English Commissioners, on the subject of theft, at pp. 266 to 272, *ante*.

With regard to the law of procedure, I propose to abolish the distinction between *felonies* and *misdemeanors*. (1) On this subject the British report says:

"The distinction between felony and misdemeanor was, in early times, nearly, though not absolutely, identical with the distinction between crimes, punishable with death and crimes not so punishable. For a long time passed this has ceased to be the case. Most felonies are no longer punishable with death and many misdemeanours are now punishable more severely than many felonies. The great changes which have taken place in our criminal law have made the distinctions nearly if not altogether unmeaning It is impossible to say on what principle embezzlement should be a felony, and the fraudulent appropriation of money by an agent or the obtaining of goods by false pretenses a misdemeanour; why bigamy should be a felony, and perjury a misdemeanour; why child-stealing should be a felony, and abduction a misdemeanour? The result of this arbitrary classification is that the right to be bailed, the liability to be arrested without warrant, and, to a certain extent, the right of the Court to order the payment of the costs of prosecutions vary in a manner equally arbitrary and unreasonable."

It is proposed, likewise, to abolish the provisions of the existing law with regard to venue.

We treat the place of trial as a matter of convenience, and the accused may be tried where he has been arrested or where he may be in custody.

It abolishes writs of error, and provides an Appeal Court, which is practically the same as the old Court of Crown Cases Reserved, with larger powers than at present (2) It provides also for new trials in certain criminal cases, and contains a new provision that, in certain cases and on certain representations, a new trial may be ordered by the Minister of Justice. (3).

The attention of the public has been directed very considerably to one change, mooted in connection with the reorganization of the law relating to criminal matters and criminal procedure, and that is the proposed abolition of the system of indictment by Grand Jury.

Senator Gowan,—to whom both Houses owe a great deal of gratitude for the great pains, care and attention devoted by him to legislation during the many years of a useful and honourable life,—moved in the matter a year or two ago, and it was thought best to draw public attention even more strongly to the question than it was by his remarks, on the subject, in the Senate. So, a circular was sent to all Judges having criminal jurisdiction, and indeed all the officers charged with criminal prosecutions, calling their attention to the proposed change, and asking their views as to its propriety and expediency.

In response, we have had a great number of replies, expressing very divided opinions; and it is impossible to deny, in view of the strong division of opinion on the subject, that it seems unwise to force that provision on the attention of Parliament at present. Personally, I concur in the opinion that in many respects

(1) See Article 535, *ante*.
(2) See pp. 663 to 672, *ante*.
(3) See Article 748, p. 672, *ante*.

the administration of Justice would be improved, if we dispensed with the intervention of Grand Juries. The proposition was mooted that this matter may be beyond the control of this Parliament, and may be more properly exercised by the provincial legislatures. When we come to deal practically with the matter, that difficulty seems to me to vanish. It is not a question, after all, of whether the Grand Jury forms a part of the organization of the Court or not, and therefore is under provincial control. It is a question whether, in criminal procedure, it is desirable to continue the exercise of functions by the Grand Jury, and in adopting an amended criminal procedure, I take it to be beyond doubt that the question as to whether we should or not dispense with the services of the Grand Juries, is one which is included in that division of the criminal law

There are two strong reasons for delaying any request to Parliament to alter the law with regard to this system. One is the opinion expressed by high authority that, for the present at least, a continuance of the Grand Jury system leads to a large body of respectable persons in the community being present at the exercise of the functions of the Court and leads to their assistance in the exercise of those functions, the result of which is said to be, and I believe it to be, that these persons have their confidence in the system of Justice as administered in this country increased ; they feel a greater cooperation and sympathy with its administration ; and to some extent additional publicity among the best classes of the community is, in that way, given to the proceedings in our Courts of Justice. Another consideration of great weight, is the uncertainty as to what procedure would take the place of that before the Grand Jury. I can suggest no other as likely to take its place, except the requirement that every person, before being tried, should be committed for trial after a preliminary investigation or an examination by some competent authority. There are many offences, for which trial may take place now without any commitment for trial preceding the charge to the Grand Jury and the application to the Grand Jury and indictment by the Grand Jury. It will be absolutely necessary that we should insist upon a provision, if we should abolish the functions of the Grand Jury, that every person tried must first be committed for trial, and in the second place that the complaint, indictment, charge, or whatever it might be, which would take the place of a Grand Jury's indictment, should be approved by the Judge before whom the trial is to come on.

Mr. LAURIER.—As the purport of the Bill is what the hon. gentleman has just explained, I think it may go at once to a second reading. There are many new features in the Bill, but I think none will startle the country or take the people by surprise. There is one matter in which I concur, and that is that the hon. genteman maintains the functions of the Grand Jury. In an earlier period of history, the function of the Grand Jury was to review the state of affairs in any county and point out any abuses that existed. This function is now largely performed by the press, but the most important function of the grand jury still remains, and that is the indictment of criminals. I know of no system that can be devised which offers not

only to society but to the party himself a better protection against undue persecution than the system of a Grand Jury.

Mr. MILLS (Bothwell).—I am pleased that the hon. gentleman has not dispensed with the constitution of the Grand Jury. There is no doubt in my mind as to its importance in the administration of criminal justice. I think the views expressed by Professor Lieber on this subject are of very great value and force, and he says that it is important to have a body to ascertain whether the party accused ought or ought not to be put on trial. The grand jury performs this function, and it also performs another, and that is the enlistment of the people in the administration of justice. The Minister of Justice admits that some other person or body would require to be invested with the powers and duties now devolving on the Grand Jury if the latter were abolished. I do not know who could be vested with that authority that would discharge the duties more satisfactorily. In my opinion it is of very great consequence that the Grand Jury system should be retained, and I should deeply regret to see any step taken to abolish it, and to substitute something else in its place.

Motion agreed to; Bill read second time.

Sir JOHN THOMPSON moved to refer the Bill to a special committee of members of both Houses, the members on the part of this House to be: Messrs Adams, Amyot, Brodeur, Baker, Carroll, Coatsworth, Choquette, Corbould, Curran, Delisle, Daly, Dickey, Edgar, Forbes, Fraser, Girouard, Kirkpatrick, McLeod, Langelier, Monet, Mulock, Masson, Sir John Thompson and Weldon.

Motion agreed to.

Mr. SPEAKER.—As there are more than 15 members on the proposed special committee it will be necessary to suspend the rule.

Sir JOHN THOMPSON moved that the rule be suspended in that particular.

Motion agreed to.

Sir JOHN THOMPSON moved that a message be sent to request the Senate to unite with this House in forming a joint committee to examine and report upon the Bill, and to inform them that the above named members would act for this House on such joint committee, should the Senate agree to its creation.

Motion agreed to.

TUESDAY 17th MAY 1892.

House resolved itself into committee on Bill (No 7) respecting the criminal Law.

(*In the committee.*)

Sir JOHN THOMPSON said that the Bill had received careful consideration from the joint committee, whose amendments were but few and principally of a verbal character.

On section 1.

Sir JOHN THOMPSON.—Short title "The Criminal Code."

On section 2.

Postponed.

On section 3.

Mr. LANGELIER.—Sub-section (*e*) raises an important question as to whether we may add anything to the jurisdiction of the Courts created by the Provincial Legislatures, in view of difficulties in reference to the Insolvency Laws, and the Controverted Elections Act, in which it was contended that this Parliament had no right to give any new jurisdiction to a Court already in existence. In the celebrated case of Valin and Langlois, the question was decided by the Privy Council, in favour of the constitutionality of the law, on the ground only that it practically created a new Court for the enforcement of the laws of the Dominion. As the Criminal Law is within the jurisdiction of this Parliament, I think we could create new Courts for the better administration of that law, but we must enact the law so as not to give added jurisdiction to the Courts created by the Provincial Legislatures.

Sir JOHN THOMPSON.—When we come to deal with the subsequent enactments with regard to Appeal Courts, what the Hon. member has said will require careful consideration.

On section 6.

Mr. DAVIES (P. E. I.)—I think the clause "*Or is deemed by International Law to be within the Territorial Sovereignty of Her Majesty*," makes this very indefinite. I do not know what International Law would decide in reference to this.

Mr. MILLS (Bothwell).—The English Government in the time of Charles II gave a charter conveying the fee of Hudson Bay. It was recognized as property of the English by the French, and we have always claimed Hudson Bay to be within our jurisdiction. An offence might be committed in that bay 100 miles from the shore, and yet it would be difficult to say that the person committing that offence came under our jurisdiction unless we incorporate the rights of international law.

Sir JOHN THOMPSON.—In using the term: "within the territorial sovereignty of Her Majesty," we have reference to cases which arise beyond the three-mile limit.

Mr. DAVIES (P.E.I.)—The doubt that arose in the *Franconia* case is settled by this definition, but *international law* is not a clearly defined or well understood law.

Sir JOHN THOMPSON.—There are doctrines established on the subject of international law which the Courts must know and must take judicial cognizance of, and we desire to see that we include the territory over which Her Majesty claims the sovereignty, particularly the bays.

Mr. DAVIES (P.E.I.)—By using the words "by international law," you are introducing an element of uncertainty, because there is no standard

Sir JOHN THOMPSON.—We insert those words in order to cover all those waters which come within the territorial sovereignty of the Queen and are so recognized by international law.

Mr. MILLS (Bothwell).—Other words, I think, are open to doubt, and will be made the subject of controversy, with the United Kingdom, namely, with regard to offences committed on board a British ship on the high seas or in a foreign port. I think some years ago the English Government objected to these words being included in the Canadian statute, and the rule is laid down in the case of Lowe *vs.* Routledge, where it was held that the moment you go beyond the limits of the country, the English law seizes you. (1) If a vessel sails from Canada to Liverpool and a murder is committed on board in the midst of the Atlantic, although the vessel was registered at Canada it is not the criminal law of Canada, but it is the criminal law of the United Kingdom that would apply.

Supposing that a murder is committed on board a vessel sailing from here to the West Indies, a Canadian registered vessel, that man would be tried under the law of England and not under the law of Canada.

Mr. CURRAN.—If he reached Canada and were arrested here, he could be tried here.

Sir JOHN THOMPSON.—All these things are now regulated by the statutes of the United Kingdom, and they are all in the line of this section.

Mr. LISTER.—How would you make this section apply to the inland lakes? That would not apply to the great lakes, because the boundary of Canada, as far as they are concerned, is the centre of the lakes. The offence might have been committed twenty miles out.

Mr. DAVIES (P. E. I.)—International law is a vague and uncertain phrase. You find one nation laying down one rule and another nation laying down another rule. On certain points where two nations agree, you can deduce a rule.

Mr. WELDON.—Take a case where a land-locked bay is six miles or less wide at the mouth and widens out to be twenty miles in

(1) Lowe v. Routledge, L. R. 3, H. L. 100.

width as you run up the bay. There is a perfect concensus amongst all international lawyers that that bay is a territorial bay. If we had not the words of this section we would not be able to deal with an offence committed in that bay ten miles from the land.

Mr. DAVIS (P. E. I.)—I do not understand that there is any *international law* defining what bays form part of the territory and what do not.

Mr. McCARTHY.—By putting in these words we cannot enlarge the territorial jurisdiction of Canada, but we ought to put in some words to make it clear that the criminal law does extend wherever our territorial rights extend. But take these words : " Or is deemed by international law to be within the territorial sovereignty of Her Majesty." They are not limited to the neighborhood of Canada. Take the Bristol Channel. Is not that deemed by international law to be within the territorial sovereignty of Her Majesty ?

Sir JOHN THOMPSON.—The words are precisely a statement of the law as it is to day. They are a declaration of the criminal law of Canada which is in force by virtue of the laws of Canada and of certain laws of the United Kingdom. "The Criminal law of Canada extends to all offences committed by any person in Canada, or on such part of the sea *adjacent to the coast of Canada* as is within one marine league from ordinary low water mark, or is deemed, *by international law*, to be within the territorial sovereignty of Her Majesty." It does not extend to the Bristol Channel. The waters "*within the territorial sovereignty of Her Majesty*," referred to by this section do not extend to the Bristol Channel. They are the waters *adjacent to the coast of Canada.* So we are only legislating in that regard as to offences committed on the seas,—*adjacent to the coasts of Canada*,—which are, by international law, within the sovereignty of Her Majesty.

Mr. DAVIES (P. E. I.)—What is the meaning of the phrase "on board any foreign ship, to which the offender does not belong." Is there no limitation as to where the foreign ship shall be ?

Sir JOHN THOMPSON.—It is exactly in the words of the statute of the United Kingdom.

Mr DAVIES (P. E. I.).—Suppose a foreign ship was in the port of New-York, and an offence was committed by a person not a seaman on board that ship, could it be held that this Act would apply ?

Sir JOHN THOMPSON.—For certain purposes of trial. In so far as this Act makes an enactment on the subject, the foreigner on board that ship to which he does not belong, could be tried here, by virtue of the Statutes of the United Kingdom.

Mr. MILLS (Bothwell).—Then the Criminal legislation in England has conferred this power on Canada ?

Sir JOHN THOMPSON.—Yes.

Mr. DAVIES (P. E. I.)—Supposing a British subject named Smith, on board a foreign ship in Constantinople, committed a murder and afterwards came to Canada, could he be tried here?

Sir JOHN THOMPSON.—Yes, he could be tried here, by the United Kingdom statutes.

Mr. MILLS (Bothwell).—Does the Minister know that under the Imperial Act the case would be tried according to the law of England, or according to Canadian law?

Sir JOHN THOMPSON.—We are given authority to try offences against common law.

Mr. MULOCK.—We are by this section declaring that this legislation gives Canada certain jurisdiction. Suppose this declaration of the law is not correct.

Sir JOHN THOMPSON.—Then it does not amount to anything. If we should legislate in any respect outside of our jurisdiction by a mistaken view as to what the enactment of the United Kingdom is, it would amount to nothing; but we do not profess to be enacting otherwise than under the authority of English Act. (1)

Section allowed to stand.

On section 12. (2)

Mr. MILLS (Bothwell).—In this clause I think the hon. gentleman is simply embodying the report of the Judges in the McNaughton case, which has been frequently criticised. A very carefully considered rule of law is that laid down in the Guiteau case, and it would be well if that case were examined, and this section altered accordingly. The delivery by the district judge who tried the Guiteau case was very carefully considered by the Judges of the Supreme Court of the United States.

Sir JOHN THOMPSON.—We can never expect to arrive at an agreement on scientific principles in legislating on insanity in criminal matters; but I always understood the rule laid down in the McNaughton case to be accepted without question. I will read the conclusion of the English criminal law commissioners on the subject:

"Section 22, which relates to insanity, expresses the existing law. The obscurity which hangs over the subject cannot be altogether dispelled until our existing ignorance as to the nature of the will and the mind, the nature of the organs by which they operate, the manner and degree in which those operations are interfered with by disease, and the nature of the diseases which interfere with them, are greatly diminished. The framing of the definition has caused us much labour and anxiety; and though we cannot deem the definition to be altogether satisfactory, we consider it as satisfactory as the nature of the subject admits of. Much latitude must in any case be left to the tribunal which has to apply the law to the facts in each particular case. The principal substantial difference between section 22 of the Draft Code and the correspond-

(1) See Art 542, and comments, at pp. 513-516, *ante*.
(2) See Art. 11, and comments at pp. 9-12, *ante*,

ing section of the Bill is that the latter recognizes as an excuse the existence of an impulse to commit a crime so violent that the offender would not be prevented from doing the act by knowing that greatest punishment committed by law for the offence would be instantly inflicted, the theory being that it is useless to threaten a person over whom by the supposition threats can exercise no influence. This provision of the Bill assumes that the accused would not be protected by the preceding part of the section, and, therefore, that he was at the time he did the act capable of appreciating its nature and quality, and knew that what he was doing was wrong. The test proposed for distinguishing between such a state of mind and a criminal motive, the offspring of revenge, hatred, or ungoverned passion, appears to us on the whole not to be practicable or safe, and we are unable to suggest one which would satisfy these requisites and obviate the risk of a Jury being misled by considerations of so metaphysical a character. It must be borne in mind that, although insanity is a defence which is applicable to any criminal charge, it is most frequently put forward in trials for murder, and for this offence the law—and we think wisely—awards upon conviction a fixed punishment which the Judge has no power to mitigate. In the case of any other offence, if it should appear that the offender was afflicted with some unsoundness of mind, but not to such a degree as to render him irresponsible—in other words, where the criminal element predominates, though mixed in a greater or less degree with the insane element—the Judge can apportion the punishment to the degree of criminality, making allowance for the weakened or disordered intellect. But in a case of murder this can only be done by an appeal to the Executive, and we are of opinion that this difficulty cannot be successfully avoided by any definition of insanity which would be both safe and practicable, and that many cases must occur which cannot be satisfactorily dealt with otherwise than by such an appeal."

Mr. MILLS (Bothwell).—The words: "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," assume that the man is perfectly rational with regard to his responsibility, but so irrational that he may altogether mistake the actual state of the facts that exist; and I think that is a rule that English practice has never followed and that cannot be followed. It is an inhuman rule. You would say: Here is a person who is insane, and the crime he has committed is only justified on the assumption that if what he supposed to be the state of the facts were the state of the facts, the act itself would be justified. Now, it is one of the characteristics of insanity that the insane man's rational faculties are so affected that his reasoning is in almost every instance inconsequential. Let any one, turn up the work of any writer on insanity, and he will see that the rule recognized in a large degree in practice is the rule that a man's responsability is diminished in proportion to the evidence of a diseased condition of the mind. We do not hold a man who is partially insane to the same degree of responsibility that we do a man who is in the possession of all his faculties; but under this rule of law we do hold him to exactly the same degree of responsibility.

Mr. McCARTHY.—I do not think we can define the nature or the degree of insanity which would entitle a person to immunity, in other words than those contained in the first part of the sub-section. A man ought not to be acquitted because of *partial* insanity unless it caused his act or omission, that is the rule in civil cases. There is the well-known case of Banks and Goodfellow, which determines the rule regulating testamentary capacity. Many men are capable of making

wills who in some matters are insane; but, unless the insanity has reference to the testamentary Act, the testament may stand. If a man is labouring under specific delusions, which is of course a species of insanity that ought not to entitle him to be acquitted, unless in addition these delusions created a belief on his part in the existence of things which caused him to commit the offence or rendered him irresponsible.

Mr. MILLS (Bothwell).—Where a party is labouring under the insane delusion and you show that what he believed while under that insane delusion was something that would have justified him in doing what he did, if the facts had been what he supposed them to be, he is protected under this section. But if he were labouring under the delusion that he was divinely directed to take another party's life, and acted under what he believed to be the direction of heaven, one would suppose,—assuming this delusion to be established,—that would be stronger evidence to acquit the accused on the ground of insanity, (partial it may be), than the other. You assume, that a man who is so insane as to imagine a state of things wholly contrary to the facts, is, nevertheless, so rational as to be capable of drawing a correct conclusion. That is, while his perceptions are all wrong, he must nevertheless be held to have a perfectly sound, *rational* faculty, and be capable of drawing a proper deduction, and of appreciating the extent of his responsibility.

Sir JOHN THOMPSON.—The extent of the disease in that case might bring him under the first part of the section. If his mind were diseased to such an extent as to render him incapable of appreciating the nature and quality of the Act or omission, if he believed he were under divine command and believed that to such an extent as to be incapable of appreciating the nature and quality of the act, of the homicide he committed, he would, of course, be exonerated. He might, however, be labouring under specific delusion in other respects and not be acquitted on the ground of insanity, 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.

Mr. MILLS (Bothwell).—That is the weak point in the provision. You assume that he reasons properly.

Sir JOHN THOMPSON.—I do not think it would be safe to legislate so far as to allow persons to plead their belief that they were authorised by divine power. The accused person would not be excused if it were a mere question of the impression on his mind as to his right to do a thing. But if he were impressed with a certain state of facts which entirely change, in his perception, the nature and quality of what he was doing or led him to suppose that a state of facts existed that would justify him in taking that course, then he is excusable, but not if he does it under the mere idea that he has authority for doing it. I should think that in a matter of such great difficulty and importance, it would be very difficult for us to do anything else than to follow the existing law in the mother country

which has been examined and criticised lately by such eminent men as those who prepared this enactment, and that, though they were conscious of arriving at an unsatisfactory solution, still it is the best that can be devised. I would prefer that we should follow the English law on this subject instead of going to any foreign country for our law.

On section 13. (1)

Mr. DAVIES (P. E. I.)—What is the reason for altering the common law as to the responsibility of married women?

Sir JOHN THOMPSON.—The presumption under the common law is a strained one. In many cases the wife commits an act of violence in spite of her husband, but the common law presumes that she acts under the compulsion of her husband if she does that in his presence. We now leave that to be a matter of evidence, to be proved whether she acted under the compulsion of her husband or in spite of her husband.

On section 22.

Mr. DAVIES (P. E. I.)—I think this section may vest powers in constables which may be used oppressively. Many of them are ignorant, and some are prejudiced men; and if you give them power to arrest a man without a warrant, and to come in afterwards and say they heard the man had committed an offence and believed he had, you may give them powers which may be frightfully oppressive. If a citizen is hauled from his home in the middle of the night and dragged to a police cell, it is poor satisfaction to have the officer come in afterwards and say, I heard so and so was guilty, and all kinds of similar trash.

Sir JOHN THOMPSON.—In the first place, there must be reasonable, and proper cause of the sufficiency, of which the Judge is to decide. In the next place it only applies to that class of offences for which arrests may be made without a warrant. It is practically applying the existing law as regards felonies.

Mr. LAURIER.—The Bill not only gives an officer power to arrest when an offence has been committed, but he may arrest a man who afterwards proves to be not guilty.

Mr. MILLS (Bothwell).—I do not think that where the Officer does not catch the man in the act of committing the offence, he ought to be allowed to arrest without a warrant.

Mr. DAVIES (P. E. I.)—If it can be shown that offenders have escaped for want of a provision similar to this, then it might be some argument to justify vesting this enormous power in a common constable.

Mr. WOOD (Brockville).—I have in my mind a case that occur-

(1) See Art. 12, *ante*.

red recently in the County of Leeds, the case of a very bestial offence committed upon the person of a small boy, and had it not been that the Police Officers were able to get in search of the offender as soon as they had received information of the offence having been committed, the person would have escaped.

Mr. LAURIER.—But here an offence may not be committed at all.

Mr. WOOD (Brockville).—Even so, it will only be in very exceptional cases that injustice would result. It may be that a lesser crime has been committed than that which would be involved in the larger offence, and the officer would have just and reasonable cause for believing he should act.

Mr. MILLS (Bothwell).—I suppose, if a man came and told another that an offence had been committed by a certain man, that would be sufficient justification for his arrest, even though there might be no foundation whatever for the statement.

Sir JOHN THOMPSON.—The case put by the hon. member for Bothwell (Mr. Mills) can hardly be considered a fair one. It would not be a justification that somebody had told the officer that an offence had been committed. It would be for the judge at the trial to decide whether that constituted reasonable and probable grounds, and whether it was sufficient to induce any reasonable man to believe that an offence had been committed.

Mr. MILLS (Bothwell).—Supposing it had been committed, and forty or fifty people had been arrested for it.

Sir JOHN THOMPSON.—This section provides for the exoneration of the officer where an offence has not been committed—not for the arrest of the wrong person. It is intended to apply to a class of cases in which an offence has been attempted, but not completed. As for example, the well-known case, which has been decided both ways in England, of a man arrested for picking a pocket when it turned out there was nothing in the pocket. In that case, without this principle of law—I am not saying whether it is the law now or not—the officer would be a trespasser. (1) Again, an officer, as in the case mentioned by the hon. member for Brockville (Mr. Wood), has reason to believe from what he hears and sees that a rape has been committed. It may turn out that the offender has only been guilty of an indecent assault, that the offence was not completed. Under this section the officer would be exonerated. Again, an officer going along a highway finds a homicide has been committed and he makes an arrest. It may turn out that the homicide was excusable. In all these cases the officer has acted promptly on information that would satisfy any reasonable man; and he does so at the peril of justification, which he can only obtain when a judge decides that he has had reasonable and probable grounds on which to make the arrest.

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(1) See R. v. Collins and R. v. Brown, *cit.* at p. 19, and pp. 41-42, *ante*.

On section 25,

Mr. DAVIES (P. E. I.)—What distinction is there between this section and section 22 ?

Sir JOHN THOMPSON.—This applies only where the offence has been committed ; the other section is for cases where the offence has not been completed.

On section 26,

Mr. DAVIES (P. E. I.)—This section is in defiance of the common law.

Sir JOHN THOMPSON.—This is the common law. The man making the arrest believes he found a person committing a felony, and this exempts the person making the arrest from criminal responsibility.

Sir RICHARD CARTWRIGHT.—What would be the case on the other side ? Suppose, under section 25, anybody who supposes he has reasonable grounds, arrests an innocent person, what would be the result to the innocent party who defended his liberty as a man has a right to do ?

Sir JOHN THOMPSON.—He would be justified.

Sir RICHARD CARTWRIGHT.—Then, being innocent, he would be justified in shooting the man.

WEDNESDAY, 18 May, 1892.

(*In the Committee.*)

On section 38.

Mr. LAURIER.—This section gives the very large power to a Peace Officer to arrest a man on suspicion that he is going to commit a wrong, without waiting until he has committed it. A breach of the peace is not a very serious offence and to place such powers as are contained in this section in the hands of officers may sometimes lead to very serious abuse.

Sir JOHN THOMPSON.—These sections are not an extension of the common law.

On section 39,

Mr. FLINT.—This clause is almost a protection to persons taking part in a riot. It is too vague and general in its terms.

Sir JOHN THOMPSON.—A riot of any considerable dimensions is not put down by the ordinary peace Officers. Persons have to be called in to assist, and very often outside persons who desire the preservation of the peace, but have no official authority have to use

their exertions to suppress the riot. The authority for this section is the code under the Bill of 1880, and the common law is considered to be exactly the same. The note made by the authors of the code as to the limitation contained in the concluding words is as follows: "This limitation is not expressed by the authorities, but it appears to be implied from the nature of the law; that is, no more force is to be used than is absolutely necessary."

Sir RICHARD CARTWRIGHT.—As a matter of fact, that Bill, although introduced a great many years ago, never became the law in England. It appears *primâ facie* that if a Bill, introduced twelve years ago into the English Parliament, with all the authority which the commissioners could give it, was not thought fit to become law, it is very dangerous for us to take a thing which is little better than a mere draft, as the guide for our legislation. There must have been great objections raised to it.

Sir JOHN THOMPSON.—I am not aware of any objections other than those which will be raised in every legislature in the way of suggestions for its improvement. The principles of this code and the efficiency of the work performed in framing it have never been doubted. It originated more than twenty years ago, but during that time the movement in favor of it has been gradually increasing in strength, and in 1879, there was the report of a Royal Commission composed of Lord Blackburn, Sir R. Barry, and Judges Lush and Fitz-James Stephen, all the very highest authorities. Their work was all revised later, in 1880, when a Bill was introduced which was almost word for word with the code. But the hon. gentleman will remember that since 1880 it has been a matter of physical impossibility that the code could be passed in the state of business in the Parliament of the United Kingdom. Nothing else, except the pressure of legislative business, would have prevented the passage of the Bill.

Mr. MILLS (Bothwell).—It was adversely criticised by Sir Alexander Cockburn.

Sir JOHN THOMPSON.—Yes, and by a great many people who are opposed to seeing anything done by anybody but themselves. The Bill gathered up all opposition of that description; but it was admitted to be a very useful one, and it was conceded that such a Bill should be adopted as soon as Parliament could pass it.

Mr. LAURIER.—This is transferring our text books into a statute.

Sir JOHN THOMPSON.—Not altogether. But where it is useful to state the law and to state the details of the law, that course has been followed.

Mr. MULOCK.—Section 39 enacts that every one is justified in using whatever force is necessary in order to suppress a riot, and the only limitation to the extent of the force is, that, it shall not be greater than the unlawful force that is likely to be set in motion in case of a riot. For example, a number of persons may be gathered together, and if as an observer chooses to say: I believe that this gathering will develop a riot from which there will be loss of life, he

can become a Peace Officer, and if in good faith he proceeds to suppress this riot by force, not slaying any more than he thinks would be slain in case of a riot, he is to be defended by this clause.

Mr. SPROULE.—The clause does not give power to *commence* action but to *suppress* a riot actually in operation at the time of the interference.

Mr. FLINT.—The common law requires persons to be acting under some authority. A few additional words like these would meet the criticism:

"Every one who is *called upon* so to do *by any Magistrate or Peace Officer*, is justified in using whatever force may be necessary."

The person interfering would then be under the guardianship of those whose duty it is to protect the peace, and not merely upon his own idea of what is right.

Mr. MILLS (Bothwell).—I suppose the intention of this clause is to embody the principles of law laid down in the Lord George Gordon riots, and in the Bristol Riots; but it would make the law much more indefinite than it was made by the decision of Lord Mansfield in the London Riots, and of Judge Tyndall in the Bristol Riots. Judge Tyndall recognized the rule, that any Magistrate was entitled to call out parties and to control the military force for the purpose of re-establishing peace, and that all citizens would be to some extent peace officers for that purpose. In this section it is said:

"Every one is justified in using force necessary to suppress a riot, providing the force used is not disproportionate to the danger to be apprehended from the riot."

It is not the extent of force or of numbers that are called out upon which the responsibility depends, but it is upon the acts which the parties who are called out do, after being so called out. There was a statement made by a military officer of distinction, one of the Napiers, who being examined before the committee of the House of Lords upon this subject, said that a military man in this case was in a very awkward position, because, if he disobeyed orders he was liable to be court martialed and shot by the military authorities and if he obeyed orders he was liable to be hanged by the civil authorities for excess of duty. Here it is provided that the force used is not to be disproportionate to the danger, but supposing the force used is not *disproportionate to* but the *cause of* the danger, does this clause aim at the cause or at the force, making the liability to arise whenever the force is greater than should be called for under the circumstances, and the number of persons called out would be taken as an indication of the illegal intention of the party who is acting. The clause as framed is not calculated to embody into statutory law the principles laid down in the decisions I have referred to.

Sir JOHN THOMPSON.—The section does not refer to the military or volunteer or police force, because it would be absurd to

enact that every one is justified in using force as a police officer. It means that the acts of violence which one does to another in aiding to suppress a riot are justified, if they do not exceed the danger to be apprehended from the continuance of the riot. As regards the argument that the provision may be abused, the same may be said of every enactment as fairly as of this. When we pass a section justifying a man in committing homicide in defence of his life, one might say that all a person has to do in order to take another's life is to imagine that his own is in danger. But his imagination is not the test. The tribunal must decide whether the force used is greater than what is necessary for the suppression of the riot. As regards what the hon. member for Yarmouth said, this is a strict statement of the common law, except the limitation following the word "provided," which is an inference, and I should think an irresistible inference from the state of the law. It is as laid down by Tyndall, Chief Justice, in the case of the Bristol riots in 1832.

Mr. DAVIES (P. E. I.)—I think the 40th and the 41st sections are all that is necessary. In them, power to use force is conferred upon the police force, and upon every one else that the police officers call upon to assist in suppressing a riot. But in this particular case you justify anybody in interfering, whether called upon by a police officer or not or whether he has any knowledge of the facts or not. The danger must be apprehended by the person using the force; because he must judge from the existing facts at the time he uses the force whether or not it is disproportioned to the danger to be apprehended, and he may apprehend very inaccurately and improperly the condition of matters. I think we shall go far enough if we give the power to use such force as the police officers think necessary. You must give discretion of that kind to a police officer, but not to those whom he calls upon to assist him. I do not think we should confer on every citizen, rough or tough, the right to interfere in order to suppress a riot and to use such force as *he* apprehends to be necessary at the time.

Sir JOHN THOMPSON.—I think great care and skill has been shown to frame the section so that it will not bear the interpretation my Hon. friend puts upon it. The danger *to be* apprehended is quite a different thing from what the person using force *apprehends* to be the danger. The law is clear that any one may interfere and use force to prevent a *breach of the peace*, and I should be sorry if the House did not adopt a provision that any person may use force to put down a *riot*.

Mr. DAVIES (P. E. I.)—The Hon. gentleman, I know is cognisant of the case that occurred in England, a few months ago, where the Salvation Army marched, in Eastport, with drums and banners, and the police turned out to suppress the nuisance, as they called it; but when the matter came before the Court, they determined that the police had not the right, even under the statute, to assume that there was to be a breach of the peace or to interfere, until there was an actual breach of the peace, although the police, and I think the

people themselves, thought that a breach of the peace was likely to take place.

Sir JOHN THOMPSON.—That was a case of arrest. In this section there is nothing at all about arrest. Neither does it provide for the case of *apprehension of a riot*. but of *an actual riot*.

Mr. DAVIES (P. E. I.)—The police considered that that was an unlawful assembly, and that they had a right to interfere. I submit that it will be perfectly justifiable under this section for any man coming along while a riot is progressing, if he thinks A or B is likely to take part in it, to arrest him on the spot.

Sir JOHN THOMPSON.—The words of this clause are taken from a charge of Tyndall. Chief Justice, to the Grand Jury of Bristol in 1832. They are given in a note to Regina vs. Penny, 3 Carrington & Penny, 261. (1) It is quoted and approved in Phillips vs. Eyre, Law Reports, 6 Queen's Bench, 15. The writer says that the proper course in such cases is for the civil Magistrate to direct and control what is done, but that this is not absolutely necessary, and then the Riot Act appears to be narrower than the common law, as laid down by Tyndall, Chief Justice.

On section 41.

Mr. MULOCK.—I would call the attention of the Committee to this provision, which is found not only in this but many other clauses, doing away with a reference to the Jury in many of these cases.

Sir JOHN THOMPSON.—If the Hon. gentleman will refer to 4 Foster and Findlayson 763, he will see comment on that. I do not think it goes beyond the present law.

On section 42.

Mr. FLINT.—This clause seems to do away with the necessity for clause 39.

Mr. DAVIES (P. E. I.)—It is perfectly plain from this section that the apprehension is to be on the part of the person interfering, and it must be on reasonable grounds.

Sir JOHN THOMPSON.—He may be a very unreasonable man.

Mr. DAVIES (P. E. I.)—Who is to judge what are the reasonable grounds?

Sir JOHN THOMPSON.—The Court He must have reasonable grounds for his belief, and if he is not a reasonable man he must suffer for using force on other people, without necessity.

Mr. DAVIES (P. E. I.)—There is a great distinction between the two sections 39 and 42.

(1) This is evidently a clerical error of the reporters or of the printers of the *Hansard*. The reference should be to Rex. v. Pinney, 5 Carrington & Paynes Reports 261.

In the one case the words are general, providing the force is not disproportionate to the danger to be apprehended; in the other case, it is the danger which he on reasonable grounds believes to be apprehended that gives him the right to use force.

Sir JOHN THOMPSON.—The first is a general statement of a general principle, and the second is an application of that principle. I do not think there is any difference at all, except that the one is more minute than the other but I will meet the wishes of the members by striking out section 39.

Section 39 struck out.

On section 44.

Mr. DAVIES (P. E. I.)—I suppose if the man is justified, he is justified civilly as well as criminally ?

Sir JOHN THOMPSON.—Yes, as far as we can do it.

Mr. McCARTHY.—If we say it is lawful for a man to do a certain thing, we should protect him against a civil action as well as against an indictment.

Sir JOHN THOMPSON.—We do not want to relieve him from civil liability if he uses unnecessary force.

Mr. McCARTHY.—But in that case we do not relieve him from criminal liability.

Sir JOHN THOMPSON.—Yes we do.

On section 47.

Mr. DAVIES (P. E I.)—What is the distinction between the 47th section and the 45th section ?

Sir JOHN THOMPSON.—I think it is that, if the assault is accompanied with insult, he may use such force as is necessary to prevent repetition, or in regard to any one under his protection. The 45th section refers to his repelling force by force in his own case.

On section 51.

Mr. MULOCK.—Here we propose to make the law so that a person may break into a man's house for any purpose, so long as it is not with intent to commit any indictable offence therein.

Mr. DAVIES (P. E. I.).—With that limitation a person is not justified in resisting another person forcibly breaking into his house. It is common to try and make forcible entry of houses which people believe they own; but it is not permitted by law.

Sir JOHN THOMPSON.—The object of the proviso is to prevent an officer being resisted by force.

Mr. McCARTHY.—Surely a party in peaceable possession has the right to defend his house against any forcible entry.

Sir JOHN THOMPSON.—A man may break into a house for the purpose of saving life or preventing crime.

On section 53.

Mr. DAVIES (P. E. I.)—After this section passes, I understand the law will be this: that if a man comes in into my house I cannot resist him, unless I have reasonable grounds to believe that his object is to commit some indictable offence.

Sir JOHN THOMPSON.—The man cannot lift a latch or force a lock without the permission of the owner, without committting an indictable offence.

Mr. DAVIES (P. E. I.)—Is there any declaration of the existing law that a man has the right to protect his possession from any person attempting to forcibly enter?

Sir JOHN THOMPSON.—These two sections

Mr. DAVIES (P. E. I.)— These two are limited to particular cases where the person attempting to enter is attempting to do so with the object of committing an indictable offence.

Sir JOHN THOMPSON.—The other is an indictable offence also.

Mr. MULOCK.—It appears to me that under this clause it would have to be shown that the trespasser was entering with an intention to commit an indictable offence.

Mr. DAVIES (P. E. I.)—If this Code is to be accepted as a complete definition of possible offences, for which a man may be indictable, it will no longer be an indictable offence to commit a forcible entrance.

Sir JOHN THOMPSON.—We will come to a provision in that respect in a moment.

On section 55.

Mr. DAVIES (P. E. I.)—I think this clause is very unjust, because if I have a right of way over a piece of land and I peaceably enter upon that land, I am within my legal rights; and if the person who claims the ownership of the land denies me the right and assaults me to prevent my exercising it, the section provides that I shall be deemed to have provoked the assault by exercising my own legal rights.

Mr. McCARTHY.—The section provides for notice being given by the person in possession if he disputes the right of the person claiming the easement. The section does not interfere with his civil rights; but if he wants to take the law into his own hands to enforce his rights, instead of enforcing them by legal process, and an assault follows, it very properly provides that the assault is provoked by the person entering.

Mr. MILLS (Bothwell).—Suppose a man has a right of way which he has used daily for a quarter of a century, and it is the only outlet or inlet to his property. This provision would put it in the power of the owner of the land to prevent his using the easement or obtaining access to his own property, and if he attempts ingress or egress to or from his own property, he will be considered an offender. It justifies the other party in committing an assault.

Mr. McCARTHY.—It is an easement which you are exercising over another man's property, and which he is disputing, and if you take the law into your own hands and try to enforce your rights and an assault is committed, you are liable. That is the distinction between civil and criminal law.

Mr. DAVIS (P. E. I.)—If I am the owner of a piece of land and another man is in possession wrongfully, and I cross the fence and go on the land, there cannot be in the eye of the law two people in possession of the land at the same time; and when I once enter peaceably on the land, I am the possessor. An easement over land is a right as well known in law as any other right. The hon. gentleman declares that although a man is exercising his legal right still the owner of that land can commit an assault upon him and drive him off, and the owner of the easement, who is exercising his legal right, would be considered the person who provoked the assault.

Mr. MILLS (Bothwell).—It is upon the civil right that the question of criminality ought to depend, but the proposed law is not letting it rest there, but is shifting it upon the man who has the easement and who undertakes to exercise his right.

Sir JOHN THOMPSON.—The mistake of my hon. friends opposite is that they assume the criminality depends upon the legal right with regard to ownership. That is not the principle upon which the criminal law proceeds in these matters. I may recover against you in ejectment if you hold my land; but although I have an absolute right and title to it and can recover on ejectment, I have no right to take possession by force.

Mr. MILLS (Bothwell).—That is a different case.

Sir JOHN THOMPSON.—This is precisely the application of the same principle to an easement.

Mr MILLS (Bothwell).—No; the party is always in possession of an easement.

Sir JOHN THOMPSON.—No, not more than the holder of a deed is always in possession. If not in actual possession, the criminal law says he shall not go there by force. That is the difference. If I have an easement on the chairman's land, which he disputes, I shall not assert my right by force, even though it be clear and capable of establishment by law. If I do, I am deemed to have provoked an assault upon myself, if an assault should occur. The hon. gentleman will find, I am satisfied, that this is exactly the common

law ; with this difference, that it makes a change in favour of the person claiming the easement, inasmuch as instead of making complete the provocation in case he forcibly asserts his right, even though he has not had any notice, it says he shall only be deemed to be guilty of provocation if he has had notice that his enjoyment of the easement is to be resisted by force. Any change there is, is in favor of the person claiming the easement.

I submit that the clause ought to pass, inasmuch as we find it reported as a statement of the common law by these eminent authorities ; and if hon. gentlemen will look into the matter, and if they then find that it is not the common law, we will go back to it.

Mr. DAVIES (P. E. I.)—The hon. gentleman will see on reflexion it is not the common law. Take the case stated by himself. Supposing A brought an action of ejectment against B, and recovered on it. If he went and got peaceable possession of the land, he would be all right. It is only when he forcibly attempts to take possession that he would be committing a criminal offence. Is not this legislation entirely in favour of the rich man, by compelling the poor man. once he is notified not to go on this land, to resort to a court of law to enforce a right which he may have exercised for fifty years, and which may be his beyond doubt? If we are to lean in any way, and we should not lean to either side, we ought rather to lean in favour of poor people who are not so well able to vindicate their right in courts of justice as wealthy people are.

Mr. McCARTHY.—We are not laying down any law here but simply what is already the principle of the common law, which is that a person who insists upon getting his right in this way, knowing that it will be opposed, is the person who is guilty of the assault.

Sir JOHN THOMPSON.—What we declare, and what we are supported in by these high authorities is that a man has a right to put another off his premises because he is coming with force to assert a right to the property, and that is what the law forbids, a man taking forcible possession of his own land. Though he may have a right under the civil law, he is an offender against the criminal law, and this is in fact intended to prevent people taking the law into their own hands. In England there may be some question of rich and poor in the case of those who insist upon hunting over the lands of poor people who seek to restrain them but that does not apply here, and in fact it is not a question between rich and poor.

Mr. DAVIES (P. E. I.)—If a man is in peaceable possession of a piece of land, and the owner comes to take forcible possession of that which is in the actual possession of another, if he makes a forcible entry he is liable to be prosecuted ; but, if he is exercising a right recognized by law such as an easement or right of way over land, he is not doing anything unlawful. Take the case of a man who is the owner of a piece of land in the rear of another, and on which no water is found in the summer season. He is obliged to drive his stock every day through his right of way over the other man's property. My hon. friend says he must go into Court to establish his

right, and all his personal property might be lost or destroyed before he would be capable of exercising that right. He would be at the absolute mercy of his neighbour, although he had purchased the right of way ; and although it may have been registered as part of his title, he cannot be regarded as in possession. It is incorporeal property of which he may be divested under this section at any moment until he goes into Court and establishes his claim.

Sir JOHN THOMPSON.—It seems impossible to convince the hon. gentleman, although we think this has been the law for hundreds of years. But we will let this section stand at present.

On section 63, sub-section 2.

Mr. McCARTHY.—Should not that be mutual? The wife should have a chance too.

Mr. DAVIES (P. E. I.)—There should be mutuality. If the wife protects the husband the natural law would rather oblige the husband to protect the wife.

Sir JOHN THOMPSON.—We will let that stand so as to alter it.

On section 72.

Mr. MULOCK.—The second portion of the section deals simply with cases of those, who are not themselves in the service, inducing men to desert. If you ask one who has enlisted in the Imperial army, or any one in the volunteer service of Canada, to abandon the service, you are inducing that person in a traitorous way to desert. What is the meaning of traitorous? It does not follow that the object is that he shall make war upon Her Majesty; the word "mutinous" might cover that: but the word "traitorous" is much wider and I think it ought to come out.

Sir JOHN THOMPSON.—I do not agree that the effect of this objection is to render any person liable who simply incites a soldier or sailor to desert, unless he does it in pursuance of a traitorous or mutinous purpose, and the traitorous purpose is defined by this Act. It must be for the purpose of forwarding some of the designs which are declared to be treasonable. It may be done in consequence of sickness, or wounds, or from a wrong religious opinion, and would not then, be punishable by imprisonment for life. But if it is done for the purpose of weakening the authority of the Sovereign, and preventing the defence of her dominion against her enemies, then it would be traitorous.

Mr. MULOCK.—I think you had better say *treasonable* instead of *traitorous*.

Sir JOHN THOMPSON.—It is the same thing.

On section 74.

Mr. FLINT.—In regard to the Militia I think this should only apply to the time of war or disturbance. Suppose one should induce a militia man to go away to better his position.

Mr. DAVIES (P. E. I.)—Suppose a father should ask his own son to leave the force.

Sir JOHN THOMPSON.—He could leave when he wished under the law, but that is a different thing from deserting.

Mr. MULOCK.—Suppose the troops are called out for the annual drill, and an employer should threaten an employee with dismissal if he should go ; he would practically invite him to desert.

Sir JOHN THOMPSON.—I do not think so, but we will look into the matter.

On section 75.

Mr. DAVIES (P. E. I.)—I understand from military men that if a man does not turn out when ordered and goes away, it is desertion in the meaning of the Militia Act.

Sir JOHN THOMPSON.—I think the provision would not apply to the case of a person asking a member of the militia not to turn out on parade day, but only when the militia is called out for active service. If this House will pass the section, I will examine it carefully, and if I find that it applies to turning out on parade, I will ask the House to review it. The Minister of Militia tells me that it is not so.

Mr. BOWELL.—A refusal to turn out on ordinary parade is only punishable by fine under the Militia Act.

On section 87.

Sir JOHN THOMPSON.—The committee were unwilling to adopt the section to its full extent as it appears here. The clause was principally applicable to the old country, where drilling was sometimes connected with treasonable designs, but at some time it may be useful to have a provision by which unlawful drilling may be prevented and the conclusion which was finally adopted was that drilling should be made unlawful when prohibited by the Governor in Council.

On section 89.

Mr. DAVIES (P. E. I.)—I do not understand "forcible entry" as defined in this section.

Sir JOHN THOMPSON.—Where a person causes an assembly that is calculated to produce a breach of the peace, that is a forcible entry.

Mr. DAVIES (P. E. I.)—Russell's definition is as follows:—

"Forcible entry or forcible detainer is committed by violently taking or keeping possession of lands or tenements with menace, force and arms, and without authority of law."

That is well understood by everybody. If a man tries to eject another from land that he claims as his, and uses force or menaces, and attempts to take possession of that property, he is guilty of a forcible entry, but here you are creating a new offence altogether.

Sir JOHN THOMPSON.—That is a very rough definition. I have carried on prosecutions myself where a person did not enter, but where the assembly for the purpose of entering was of such a character as would likely provoke a breach of the peace. This is what the Commissioners say:

"Forcible entry and detainer are offences in the common law. Section 95, we believe correctly states the existing law."

Burbridge states it thus:

"Every one commits a misdemeanour called a forcible entry who, in order to take possession thereof, enters upon lands or tenements in a violent manner, whether such violence consists in actual force 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."

He states authorities for that.

Mr. DAVIES (P. E. I.)—I remember a case some years ago, in which the question was thoroughly threshed out. My recollection is that the conclusion was that unless there was *force* and *violence* in the entry, you could not maintain your action, although the intention might have been to have entered by force, but the party could not see his way to do it, and the indictment failed. But here, if a man entitled to land enters on it in a manner *likely* to cause a breach of the peace, he is punishable.

Sir JOHN THOMPSON.—The hon. gentleman can look at these authorities, and if I am wrong, we can revise this section.

Mr. LAURIER.—I would call the attention of the Minister to the 3rd sub-section: "what amounts to actual possession or colour of right is a question of law." What amounts to actual possession is certainly a question of fact which ought to be left to the Jury.

Sir JOHN THOMPSON.—As in all the sections which provide what shall be questions of law, the enactment does not refer to any disputed question of facts. The fact may be that somebody was in actual possession, it may be in a technical way by nobody else being in possession, it may be by some servant or agent being in possession, all of which facts are to be found by the Jury; but the effect is a question of law.

Mr. LAURIER.—Even that way it would simply imply nothing new. In criminal law as well as in civil law, what is done by an agent in such a case as this is done by the master. It seems to me that you are removing something to the province of a Judge which has been within the province of a Jury.

Sir JOHN THOMPSON.—That is not intended by the section, and if it were so, it would be a departure from the common law. For example, the actual owner is resident abroad, but his agent or

his personal servant is in possession of the house. It is not the province of the Jury to say that he was not in actual possession because only his agent or his servant was there. We reserve that as a question of law for the Judge to decide.

On section 96,

Mr. DAVIES (P.E.I.)—Is this not carrying the penalty for prize-fighting too far ?

Sir JOHN THOMPSON.—They fight just over the border.

Committee rose and reported progress.

TUESDAY, 19 May 1892.

(In the Committee)

On section 104.

Mr. MULOCK.—This clause is unnecessarily severe The offence consists in having in one's possession something dutiable, and for which one has not paid duty, and having at the same time an offensive weapon. It is argued in favor of this clause that we must assume that the weapon is in the possession of the accused for the unlawful purpose of enabling him to defeat the revenue. But it is not stated here to be necessary to show that the weapon is in his possession for that purpose; but if the two things happen together that a man has in his possession, say only a cigar that was dutiable but which had not paid duty, and at the same time an offensive weapon, he is liable to ten years imprisonment Senator Loughead in the committee stated that it was the practice in the North-West for the people to carry weapons. That is an offence under the law, for which there is an appropriate remedy. If in the North-West it should happen that a person who carried a weapon for defensive purposes, which appears there to be almost as necessary a part of a man's apparel as his hat or boots, happened to be found in possession of some article that should have paid duty, Inland or Customs, we are bound to come to the conclusion that he has the weapon for the purpose of committing violence on some person who would try to seize the contraband article in his possession. I think the section should be modified, and it ought to be shown that the offensive weapon was in his possession for the purpose of enabling the accused to retain possession of the contraband article, or for the purpose of enabling him to defeat the revenue.

Sir JOHN THOMPSON.—The section is the present law, excepting that we have altered the life penalty to ten years imprisonment as the maximum. It is based on the principle that a man who carries a deadly weapon carries it for some purpose, which is certainly to defend himself and the property which he has in his possession, if it be not for a worse object—aggression on some one else.

The property in his possession in that case is property which he has in violation of the law, that is contraband goods, liable to seizure and forfeiture. Under these circumstances, if it be not made highly penal for a smuggler to carry arms, the Officers of the law have no protection for their lives, because smugglers always will carry arms

Mr. DAVIES (P.E.I.)—We have already provided for the case of a man who merely carries a deadly weapon. If a person carrying a weapon at the same time has in his possession goods which he knows to have been smuggled, it is right that he should be punished severely, but the question is whether under this section a person having goods in his possession, not knowing them to be liable to seizure, might not fall into the meshes of the law.

Sir JOHN THOMPSON.—I am willing to adopt an amendment that the party should *know* the goods are liable to seizure.

On section 105,

Mr. DAVIES (P.E.I.)—That ought not to extend to a man having a pistol in his possession in his own house.

Sir JOHN THOMPSON.—All these sections with regard to carrying weapons are, I admit, severe, and it is the only way to prevent the carrying of weapons for offensive purposes.

I do not think there is any case in which a person would carry arms in his own house, unless he had reason to fear assault or injury to his family or himself, and that case is provided for. Even though he should carry them in his own house without necessity, the law is not likely to be enforced unless there is some special reason for it.

Mr. DAVIES (P.E.I.)—I believe that the section should only apply to persons carrying arms in public places.

Sir JOHN THOMPSON.—This has been the law for a long time, and we have never heard any objection to it.

On section 108,

Sir JOHN THOMPSON.—The object of this section is to punish any one who playfully points a weapon at another. Of course, if it were pointed with the intention of doing injury, the offence would come under other sections. But when one *playfully* points a weapon at another, it is intended to make the punishment the same, whether the weapon is loaded or unloaded.

On section 110.

Mr. WHITE (Shelburne).—Why should this section apply only to seaport towns or cities ?

Sir JOHN THOMPSON.—That is where seamen carry these knives in pursuance of their occupation. But this is to prevent other people carrying them.

Mr. DAVIES (P. E. I.)—It has been found very dangerous in seaport towns to allow seamen to carry sheath knives at all when ashore. I thought this was to prevent seamen from carrying weapons at all.

Sir JOHN THOMPSON.—So it is, unless engaged in his lawful trade or calling.

Mr. MILLS (Bothwell).—This will only apply to seaport towns. This will allow sailors to go armed in seaport towns, but nobody else shall.

Sir JOHN THOMPSON.—It will forbid any one carrying a sheath knife unless in pursuit of his lawful calling as a seaman or rigger.

Mr. DICKEY.—This is really an exception to the section we have just passed. Section 109 will not apply to seamen and riggers in the lawful exercise of their calling.

Sir JOHN THOMPSON.—There is nothing about a sheath knife in 109.

Mr. DICKEY.—If a sheath knife is not covered by 109, I may carry a sheath knife and it might be just as dangerous as a bowie knife.

Mr. MILLS (Bothwell).—It certainly seems to me that the intention is to confine the exception to the seaport towns.

Sir JOHN THOMPSON.—I agree with you there.

Mr. MILLS (Bothwell).—If the object is to apply the clause to others as well as seamen it ought to apply everywhere.

Section postponed.

On section 122.

Mr. DAVIES (P. E. I.)—Whatever reason there may have been, parts of the United Kingdom for enacting provisions of this kind, aimed at secret societies formed for the purpose of undermining the Government of the country.

Sir JOHN THOMPSON.—The Hon. Gentleman will find every lawful case covered by the sub-section.

Mr. MILLS (Bothwell).—I do not think we should legislate in this way. The Government is not now like the *Grand Llama*, a sacred institution, which the people worship. The Government are regarded, now, as trustees for the whole nation, and like other trustees are subject to criticism and examination into their conduct, and condemnation of their conduct if not deserving of approval. Every department of the Government, every person connected with it is subject to adverse criticism. This section goes to the full extent of asserting the doctrine of high prerogative which was entertained at one time, when it was supposed that the Sovereign possessed certain

powers altogether independent of any compact with the nation, and when it was assumed that the business of the people was to pay their taxes and keep quiet, if properly protected by the law in the exercise of their private rights. This section is not legislation by free men for the purpose of maintaining popular liberties, but legislation to restrain those liberties, to prevent criticism and to punish men for criticising the conduct of the Administration. It is only so long as the yoke of Government and of law does not chafe those who are seeking to maintain their rights that they will contentedly submit to the law, and the strength of the law and the disposition of the community to observe it, depends largely upon that principle. This section could only be free from danger to the community by remaining a dead letter upon the Statute-book.

Sir JOHN THOMPSON.—There is not a word which restricts, in the slightest degree, any comment upon the Government or upon any department of it, or on the way in which public affairs are administered. On the contrary, it is distinctly provided that it shall not be sedition,—

"(*b.*) To point out errors or defects in the Government or constitution of the United Kingdom, or of any part of it, or of Canada or any province thereof, or in either House of Parliament of the United Kingdom or of Canada, or in any Legislature, or in the administration of Justice; or to excite Her Majesty's subjects to attempt to procure, by lawful means, the alteration of any matter in the state."

That covers the case of every man in the country who seeks even to change entirely the constitution or the administration of the country, or of any of its departments, *by any lawful means whatever* that can be devised. The one thing which is forbidden by it is the treasonable attempt, not against the person of the Sovereign, but to excite her subjects to rebellion. I agree in one sense, and disagree totally in another, with the remark of the hon. gentleman when he says that the time is past when the Sovereign is to be treated otherwise than as a trustee for the people. As regards the preservation of our institutions the Sovereign is not to be regarded as a trustee, as regards the way in which her property is to be treated she is regarded as a trustee. But, if she is to be regarded in the view of the Criminal Law simply as a trustee, then it would be no offence to attempt to dethrone her by violence even, and to appoint another trustee in her place. We propose to retain the rule which has always prevailed in the British Dominions: That the Sovereign as a ruler is something more than a trustee, although as a holder of property she is nothing more. If the hon. gentleman will look again at the case he has cited, he will see that he is entirely mistaken as to this being a proposition of mine to change the common law. Lord Blackburn, Sir Charles Barry, Sir Robert Lush and Sir Fitz-James Stephen declared under their own hands that "this is as exact an application as we can make of the existing law."

Mr. MILLS (Bothwell.)—That may be, but my objection is to undertaking to make such a statement.

Mr. MULOCK.—Every one is agreed that all proper provisions should be enacted for the preservation of the existing political relations between the people of Canada and our present constitution. But, if this language is calculated in the slightest degree to impair freedom of speech which does not disturb the constitutional relations between the people and the state, then to that extent the provision should be modified. If you leave out sub-sections (*c*) and (*d*), or qualify them by referring to sub-sections (*a*) and (*b*), then we would have an interpretation of the meaning of these words without which they are vague. The Minister says that even if (*c*) and (*d*) might, by reason of vagueness, be open to an improper construction, the saving clause in sub-section 2 is sufficient. I do not think it is. Sub-section 2 does not say that any person who in good faith for the purpose named raises a "ruction" should be exempt. It only says by way of proviso that no one shall be deemed to have a seditious intent only because he intends in good faith to show that Her Majesty has been misled or mistaken. It does not say that an honest intent shall be a defence. The hon. gentleman has made the mistake of enumerating the only instances in which good faith will apply, and therefore the saving clause is not at all sufficient. If I were to go on the platform, which painful duty may some day compel me to do, and point out the political crimes of an individual Minister of the Crown, for example, that is not specified in sub-section 2.

Sir JOHN THOMPSON.—It is not an offence under the main section to attack a Minister.

Mr. MULOCK.—Yes, it is. If I address an audience and raise hostility and ill-will between the various sections of that audience, I am *primâ facie* liable to sedition, unless I can show that I was proceeding in good faith to do—what ?

Sir JOHN THOMPSON.—To point out errors or defects in the Government.

Mr. MULOCK.—It must be proved that my aim was to show that Her Majesty had been misled or mistaken in her measures, or that I was pointing out errors of defects in the Government or in the constitution of Canada or the United Kingdom. You might say that I was only pointing out the errors of an individual member of the Government. An error of the Government is an error of the whole body ; the error of an individual is not an error of the Government, because we have the Government here repudiating the acts of individual members of the Government. If the Government held itself as a whole responsible for all the official acts of its individual members, I could understand it.

Sir JOHN THOMPSON.—I do not agree with the hon gentleman that making a speech which people might not agree with is stirring up hostility between different classes of Her Majesty's subjects. The denunciation of a Minister which might be disapproved of by the whole audience, although it might excite hostility and ill-feelings in their minds, is not the hostility referred to in this Bill.

Mr. MULOCK.—The Minister may get up and deliver judgment, but that does not bind other judges, beyond all question of controversy.

Mr. CHOQUETTE.—Would a speech favoring annexation be seditious?

Sir JOHN THOMPSON.—Not if the person thought that the constitution should be changed by lawful means.

Mr. DAVIES (P. E. I.)—It is very well to defer to the high authority of the Judges who recommended a definition of a seditious offence. No doubt they did not hear any argument and had not a specific case before them, and did not pass judgment; they only made a report in which they expressed an opinion, but it is possible to suggest reasons why this should not be embodied in a statute. Let the matter be left open.

We are here defining that which has hitherto been considered vague and uncertain, and properly so considered. The liberty of the subject is not a matter to be trifled with; and it has always been held desirable, even at the time when the Crown was attempting, a hundred years ago, to invoke absolute powers and crush out liberty on the part of the subject, that the Jury should have complete control and that the Parliament should not pass laws defining by hard and fast lines how far a man may go. The common law is elastic and justly elastic. It is made by the prudence and wisdom of the Judges, from time to time, and the Jury's acting under the guidance of the Judges, to suit the development of the people and the constitution. That which was at one time considered a seditious libel in Great Britain would now be laughed at by a Jury. There were times when a man would be hanged, drawn and quartered for writing what he may now write with perfect impunity. A thousand and one reasons can be cited to show that it is not only justifiable, but in many cases necessary, that extreme language should be used for the redress of grievances, not simply of the state, but of classes in the state. A few years ago if a man advised his fellow workmen to band themselves together in the form of a trade union for the purpose of demanding and enforcing higher wages, he would have been liable to very severe penalty. Parliament had to intervene to alter the common law and allow that to be done which at one time was considered by the Judges a very heinous and grave offence. Most educated men now think that is justifiable and proper, and working men are commended by the ministers of the state, and the highest authorities, and the best thinking men, for uniting to defend their rights. It is impossible to say offhand what might be the possible outcome of this; but I do not hesitate to say it is in the direction of hampering the liberty of the subject which hitherto the citizens of Canada have enjoyed and which they have not so far allowed to degenerate into license.

We have our public meetings and discussions, but we manage, after British fashion, when it is all over, and party feelings and passions have passed away, to forget the excitement and everything goes on smoothly as before. The people of all classes should have all the rights they have heretofore had to alter, or ask for the altera-

tion and improvement of any matters of state and to inculcate disaffection even and discontent. It may be most laudable to inculcate disaffection and discontent in order that a remedy may be applied for the removal of the grievance aimed at. As my hon. friend beside me says, suppose you attack an individual member of the Government in violent terms, suppose you say his presence in the Cabinet is a menace to the country, do you think that you are protected by the proviso—"to point out errors or defects in the Government or constitution of the United Kingdom, or any part of it?" The presence of one or two or three Ministers as advisers of Her Majesty, may be pernicious, and it may be desirable that they be removed, but you would not come under this proviso if you denounced them in the severest language. You could not plead that you were pointing out errors in the Government or constitution. You might inveigh against the Administration in such a way as to raise discontent, and I do not see how you could find shelter behind this exception. The ground on which I base my objection is the broad and general ground that you are attempting to define what had better be left undefined, and that no good ground exists for attempting to define a law, the definition of which has heretofore been left to the Judge and Jury. The great safety the public had seventy or seventy-five years ago, in prosecutions for seditious libel, when three-fourths of the Judges were prepared to send men to prison, lay in the fact that the Juries would not find a conviction although the Judge strongly directed them to do so. Now we are attempting to make a definition; and when you have done so, the Judges will instruct the Jury that cases come within the definition, and a very large and important and proper discretion, vague though it may be, a discretion which has heretofore been left to the Jury, will be to some extent taken away from them by this definition. I would not oppose any clause aimed at a definite object. If you want to suppress crime, incitements to crime, conspiracies of any kind, riotous or disorderly assemblies, let us do it; but do not let us by definition limit that liberty which I do not think any gentleman can say has yet degenerated into license. That should be left to every individual to enjoy as he has heretofore enjoyed it. I think we are running a risk without any necessity, and I would suggest the desirability of striking out this clause. If the common law covers any part of it, you can resort to the common law; if it does not, you are improperly legislating to the extent it does not. (1)

Sir JOHN THOMPSON.—I wish to say a few words, and will then propose to let the clause stand, in order that my hon. friends opposite may consider what amendment should be adopted with the view of arriving at the result we are both agreed upon. I find my hon. friends opposite differ diametrically from me as to what the meaning of this section is. Two gentlemen, for instance, say that they would come within the prohibitory terms of the clause if they, addressing a public meeting, stated that the presence in the councils of the Sovereign of a certain individual was a danger to the state, because that was calculated to cause discontent and disaffection

(1) For a brief outline of the law on the subject of seditious libels, etc., see pp. 67-72, *ante*.

among the audience. I do not think it would imperil a hair of the head or take a dollar from the pocket of any man to say that the entire Administration is a curse to the country and should be turned out, if he thought so, because he would be attempting to procure by lawful means "the alteration of some matter in the state," and this the Bill says he shall be allowed to do without any punishment whatever. My hon. friend says we ought not to cripple the liberty of the subject and liberty of speech. I avow at once it is not the intention to change the law one iota in this respect. That which is the common law we are not making any more stringent or less elastic by putting it in the statute. If my hon. friends, on reflection, can point out where we vary one hair's breadth, let them offer an amendment, and I will accept it, and make the Bill exactly the same as the common law, as these Judges think they have done already. As to this question of trial by Jury and the functions of the Jury, that would remain under this Bill precisely as it is now. The functions and power of the Jury and the way they protect the subject in England do not lie at all in defining the law, but in having the absolute and uncontrollable right to decide whether the accused has violated the law or not.

Mr. DAVIES (P.E.I.)—The entire question was one for the Jury —libel or no libel, no matter what the Judges thought about it.

Sir JOHN THOMPSON.—Yes, entirely. The duty of the Judge always was to lay down what constituted a libel, and the function of the Jury was to say whether the accused had violated that or not, and whether the publication complained of, therefore, was a libel or not. The case in which an attempt was said to have been made to control the Jury was one in which the Judge endeavoured to lay down that the prisoner was guilty of libel if he published the article, and simply left it to the Jury to find if he had published the article. The Jury returned a verdict of "not guilty," and that verdict was understood to be necessary in the interests of freedom of speech and freedom of the press. It is now for the Jury to say whether a prisoner is guilty of stirring up discontent, promoting feelings of ill-will, and so on, or whether he intended in good faith to bring about a change in some matter in the state. So it will be absolutely in the hands of the Jury, as it is now. I think hon. gentlemen on consideration will come to that conclusion, but, if not, they should suggest an amendment.

Mr. MULOCK.—The whole history of English institutions warrants us in concluding that the greatest safety lies in freedom of discussion. A British mob allows its ill-will to pass off by using strong language, while in other countries where freedom of discussion is prohibited, this ill-will takes the form of deeds of violence and causes the formation of secret societies. In this country we have the Orange Order and we have the Hibernian societies, and they are all perfectly equal before the law, and they assemble, I presume, on their festal days, and largely stand by their views and principles, and each probably arraigns the other side. I presume that neither has the slightest idea of converting the other to his own views, so

that they cannot have any intention, to bring about a change in matters of state, and, if that is not their intention, they are liable to be found guilty of sedition under this section. I think the Minister will be consulting public opinion if he drops the sub-sections interfering with freedom of speech except so far as they are necessary to the maintenance of our institutions.

Section postponed. (1)

On section 124. (2)

Mr. FLINT.—Would the Minister kindly explain this clause?

Sir JOHN THOMPSON.—That is the present law. It simply gives the right to a foreign potentate at amity with Her Majesty to prosecute for a libel which is likely to have the result of exposing him to the hatred of his own people. The celebrated case of Peltier,(3) who was tried for libel against Napoleon, was a case of that kind. As regards the effect on the estimation of the people of the foreign state, the potentate who prosecutes, or the person who prosecutes on his behalf, has to show that, and that has to be judged by the violence of the language which may be used.

Mr. DAVIES (P.E.I.)—It may be necessary in England, against political refugees who go there from Austria, Poland, Russia, France or Italy, and make England a haven from which they disseminate their seditious literature against the potentates from whose realms they have escaped. But it is hardly necessary in Canada; I fail to undestand the meaning of these words; "tending to degrade, revile or expose to hatred and contempt *in the estimation of the people of any foreign state.*"

Supposing a libel was published against the President of the United States it would seem to me that what you have got to show is: Does this libel, *in the estimation of the people of the United States*, tend to degrade and revile the President? I do not see how the standard you set up is to be reached. Who is going to tell whether the people of the United States estimate that this libel tends to degrade the President?

Sir JOHN THOMPSON.—The question is not whether it *does* degrade him, but whether it *tends* to degrade him in the estimation of the people in the foreign state, and the duty of the Judge is to say to the Jury: Do you believe that that libel, containing these words published by the defendant, *tended* to degrade this person in the eyes of the people of the foreign state? What evidence the Jury may find on is another question. In the case of a criminal libel the Judge puts it to the Jury without any evidence of effect at all. It is for the Jury to say whether the language tends to that effect.

On section 131.

Mr. DAVIES (P. E. I.)—In this section we are assuming the possibility that some one holding a judicial office might corruptly

(1) See pp. 67–72, *post*.
(2) See Art. 125, at p. 72, *ante*.
(3) R. v. Peltier, Holt on Libel, 78; 28 How, St. Tr. 617. See note (5) at p. 248, *ante*; and see Most's case *cit.* at p. 72, *ante*.

accept a bribe. Would it not be well to assume a similar possibility on the part of a member of Parliament or of a Provincial Legislature?

Sir JOHN THOMPSON.—I will make a note of the suggestion, and we will come back to this section, if I find the matter is not provided for.

Mr. MULOCK.—When passing section 123, I was out of my seat. I intended to suggest that the following words should be added: "or receiving any benefit under any such contract."

Sir JOHN THOMPSON.—I have no objection.

Amendment agreed to.

On section 142.

Mr. MULOCK.—From the interpretation clause, which defines the term "public officers," you will see that a public officer is not simply a customs officer or an excise officer but practically any person who is engaged in the Dominion service in any capacity, however trifling this service may be. Any militia officer, any person in the Mounted Police, any person engaged at all in the public service of Canada, is by the interpretation Act a public officer, and you are making it an offence to resist him, and of the same class as the offence of resisting a custom house officer. I do not think that it is reasonable. It is a new section; it is really amending the Militia Act, the North-West Mounted Police Act, the Civil Service Act—it is amending every Act on the Statute-book of Canada which requires any public service to be performed. I thought this Bill was a codification; I understood you were not making new laws.

Sir JOHN THOMPSON.—I do not want the Hon. Gentleman to assume that,—I never said it. As regards this section, I do not see why any other class of public officers should not be protected to the same extent. Under the present law protection is extended to customs and inland revenue officers by punishing persons with imprisonment for life who obstruct them in the execution of their duty. We have included certain other officers in the definition of what a public officer is; it seems to me they are officers of quite as high a class and quite as deserving of protection; such as officers of the army, navy, marine, North-West Mounted Police and other officers in the public service of Canada.

Mr. MULOCK.—It is not the officer we are considering, it is the duty he is perfoming, and we are providing a penalty to secure the performance of the public service. Now, you have the civil servants in the lobby. If any one obstructs one of these messengers in his duty of opening or closing a door, you are putting that offence on the same category with the offence of interfering with the collection of revenue. I think that the provision should be simply limited, as at present, to the collection of revenue, and if it is desirable to impose penalties in order to secure the due enforcement of other branches of the public service, let us consider those branches and then assign punishments to any who interfere with the carrying out of the service.

Sir JOHN THOMPSON.—In all these cases we have to describe the general offence, and we have to provide the maximum punishment for the gravest kind of that offence, leaving it to the discretion of the court to mitigate the punishment according to circumstances. The only thing to be considered is not the duty that the officer may be performing—that is a matter for the court to consider and to adjust the penalty—but the class of officers who are entitled to protection. I do not see why any officer in the service of the Government and in the discharge of a public duty, is not entitled to be protected to the same extent as an officer of the customs or of the inland revenue. It is true they may be performing very slight duties, so may the other class; but if they are discharging duties on which the public interest depend, there ought to be a severe penalty for the worst class of cases.

Mr. FRASER.—It seems to me absurd that resisting a fishery officer should be made as great a crime, in the eye of the law, as resisting a customs officer. I think there should be a distinction drawn in the gravity of the punishments. For example, a man may be protecting a net. That is not of so much importance to the Government as to see that the revenue is collected. A man may be going on board a ship and confiscating it, and the Government receive large sums in that way; but to say that a man may be sent to the penitentiary for ten years for resisting an officer in the discharge of his duties in a minor matter such as the fisheries is out of all proportion.

Mr. DAVIES (P. E. I.) —In the case of the customs and excise, you have, *ex necessitate*, to vest arbitrarily in the officer ample powers to prevent anybody interfering with him. But it is not so in all cases. The fishery laws enable a fishery officer to seize all the property of a fisherman engaged in catching oysters, or engaged in catching fish of any kind or description, and to confiscate all that property. It is well known that at times subordinate officers attempt to act in a very arbitrary way, and for mere resistance on the part of the fisherman in a moment of excitement, when his property is about being seized, you make him guilty of an indictable offence, and render him liable to a criminal prosecution. I know of cases in my experience where time and again a subordinate fishery officer has acted with such arbitrariness as quite justified the man in resisting until he got legal advice, and in most cases where he got legal advice he succeeded in getting the property back at once. But if under this law he attempts the slightest resistance, confiscation follows, and he may be put in an awkward box.

Mr. TUPPER.—I take it that we are legislating for the important cases in connection with the fisheries. In regard to the very important work of protecting the inshore fisheries, it is of great importance that there should be no interference with the fishery officers who had to perform this delicate and important duty. I submit that it is of the utmost consequence that every co-operation and assistance should be given to fishery officers in making seizures, which in some cases, are vessels within the three-mile limit.

Mr. FRASER.—I admit that, but there will be no appeal because this will be a criminal prosecution, and the person accused will have no advantages. There should be a distinction made between the classes of officers. Collectors of Customs—and I am not saying anything against fishery officers—possess education and knowledge so as to enable them to do the work more effectively, and to give the same power to fishery officials who receive $20 a year, is not to legislate on a correct principle. A collector of customs at any seaport is a man who will not do an arbitrary Act, but a fishery officer receiving $20 a year in a neighbourhood where there is generally some little feeling aroused, should not be protected by the law so as to make a party who resists him liable to imprisonment for ten years.

Mr. MULOCK.—The existing law requires that offences of this class shall be accompanied by violence or threats of violence. It must cover resistance to collection of revenue or some interference with the law respecting trade and navigation. It is proposed to apply these penalties to very different classes of conduct and to very different classes of officers. A man might go into his own house and lock the door and be held to be resisting, and become liable under this Act as if he had committed an offence under the old law. One Clerk interfering with another in the discharge of his duties will be liable to be included under the proposed amendment. This section is bureaucracy gone mad. Hon. gentlemen opposite are going to make everything criminal.

I hope the Minister will consider the clause, and if there are any other radical changes he will make them known to the committee. Otherwise we are not codifying but legislating by wholesale. I have no doubt that the penalties in the Customs, Inland Revenue, Militia, North-West Mounted Police and Civil Service Acts are different, and wisely and rightly different, because the duties are different and the offences are not the same. Whenever Parliament declared a new offence it gave due consideration to it, and yet we are asked wholesale to say that every one of these Acts should be amended without taking the trouble to turn up the Acts themselves, and obtain an intelligent idea in regard to them.

Sir JOHN THOMPSON.—I do not think the change is so great as the hon. gentleman suggests. There is a change so far as extending the Acts to other officers, some of whom are of major and others of minor class. But the principles of the existing law are not departed from. The hon. gentleman talked about locking a door of his own house and so on, but I do not think on reflection the hon. gentleman will give an opinion that such would be resisting and obstructing an officer. In section 34, cap. 162, of the Revised Statutes the same words are used as in this section, and a penalty of two years imprisonment is provided.

Mr. MULOCK.—You are now making it ten years.

Sir JOHN THOMPSON.—The case will be very rare which will call for punishment of ten years. I shall be glad, however, to accept any suggested amendment in regard to the term of imprisonment.

Mr. MULOCK.—I will suggest an amendment to-morrow.

Mr. DAVIES (P.E.I.)—When an Officer is armed with a legal warrant to execute it under the authority of the Queen, any one who resists him should be punished, but it is different where men are armed with arbitrary power which they exercise of their own motion and without a warrant. For instance, a fishery Officer goes to the seaside and he thinks a man is fishing for oysters and he seizes his appliances, and that man feeling sure that he is not breaking the law tries to escape from the Officer who is trying to arrest him without a warrant, do you wish to make him guilty of an indictable offence for that? There ought, to be some distinction between a man armed with a legal warrant which every one is bound to obey, and a jack-in-office executing what he supposes to be the authority vested in him by statute.

Mr. TUPPER.—Under the existing law the fishery officers are Justices of the Peace, as the hon. gentleman knows, and that has been the law since 1867 The protection included in this Bill has been given to the fishery officers ever since the fishery Act was passed.

Mr. FRASER.—There is this distinction. Fishery officers are Justices of the Peace, but not in the same sense as Justices of the Peace who receive a commission.

Mr. TUPPER.—They are of a much higher class than the ordinary Justices of the Peace.

Mr. FRASER.—They are Justices of the Peace for the enforcement of the law, and can sit upon cases. You must remember that they always have a motive for executing the law because they make something out of it, and that is different from the ordinary Justice of the Peace. Of course if a Justice of the Peace sees a violation of the law openly before him, he can act without warrant; but the Justice who is appointed for the purpose of preserving the Peace, is a different man from the officer appointed by the Government, and who receives a salary and is an *ex officio* Justice of the Peace for the purpose of carrying out that office.

When a person has a legal warrant which can only be issued upon regular information, he is in a different position altogether from the officer who has no warrant. Very often these officials think they know the law, but they do not, and they put strained constructions upon it. An officer of this kind may think that a person is violating the law when he is not. Now, if a man resists the officer putting forth authority, would it be any defence that he was acting legally? It may be pleaded as a mitigation of punishment, but it would not be a defence under this section.

Sir JOHN THOMPSON.—We will make the punishment less, but I cannot adopt the distinction between an officer with a warrant and an officer without it. If I did that, I would be repealing half the law which has been in existence for years. I will make the punishment four years or less, but I think there ought to be punishment for a person who *resists* an officer.

Mr. DAVIES (P.E.I.)—Is the Hon. gentleman able to state that there has been any miscarriage of justice by reason of this Draconian code not being in force ?

Sir JOHN THOMPSON.—My hon. friend will have to answer that question himself. I think I am entitled to ask him, whether, this Draconian Code having been in force almost as long as he and I have lived. he can point to any oppression having come from it. Officers of less authority and less intelligence than fishery officers are clothed with more power in this respect. Officers connected in any way with the collection of the revenue have this protection, only that instead of a punishment for ten years it is a life imprisonment That is Draconian, and we are unanimous in thinking it too severe ; but we are not to be told that this is a new provision altogether. Then again, there is the provision with a lesser punishment of two years imprisonment extends to any one who obstructs a person seizing trees or logs, in the due execution of his duty, without a warrant, or any person acting in aid of such officer, or any person resisting an officer in the lawful execution of any process against any lands.

Mr. DAVIES (P. E. I.)—We do not object at all to a person being punished for resisting an officer who is executing a process. I am limiting my objection to an extension of the existing law to cases where an officer acts on his own discretion, not in pursuance of a legal writ, and attempts to seize the property of a citizen.

Mr. MASSON.—I do not understand why the hon. gentleman objects to the section extending to all public officers. There are many officers in customs who receive no salary, but only get a share of the forfeitures and penalties which their work brings into the revenue, and they have inducements to be arbitrary. But other officers, such as fishery officers, have not the same inducements that customs officers have to make arbitrary seizures. In all these cases the law has made the resister liable to imprisonment for life, and yet there has been no case of that law being executed in an arbitrary manner. As the Minister of Justice has stated, the cases in which an indictment is necessary are extremely rare, and the criminal law is very seldom enforced.

This matter was discussed pretty extensively in the committee and it was unanimously agreed that the life penalty was altogether too severe, and ten years imprisonment was suggested as a limit. The Minister of Justice has now reduced that to four years, which, personally, I think much better Provision might even be made in some cases for the imposition of a fine instead of imprisonment, because many of the offences would be of a very trifling nature. We protect Sheriffs, Deputy-Sheriffs, Bailiffs and Constables, and in some cases fines are afflicted ; and even where imprisonment is permitted, I believe the Judges as a rule impose short sentences or fines.

Mr. FLINT.—If the Minister is inclined to make two classes of offences, I would suggest that he should not only reduce the

maximum term of imprisonment, but also allow the magistrate the option of a fine in trifling offences.

Section postponed.

Committee rose and reported progress.

WEDNESDAY 25th May 1892.

(*In the committee.*)

On section 143.

Mr. DAVIES (P.E.I.).—Perjury is by the common law an assertion on oath as to a matter of fact *material to the issue* being tried. A statute, was passed some years ago in Canada; the language of which is rather curious; and some lawyers hold that the definition extended under that statute, to every statement made on oath, *whether material to the issue or not.* I am sorry that some attention was not called particularly to the sections in our Bill which alter those of the English Bill of 1880 in matters of definition. In this section the very material words are added: "*Whether such evidence is material or not.*" It is well that the committee should understand that a witness nowadays is subject to examination of a most severe character, extending to matters which have no relation to the subject before the Court, and which is allowed for the purpose of testing his credibility. It may be right or it may not that we should attach to every statement made by a witness, whether it has reference to a material part of the examination or not, the qualification of perjury, if wilfully incorrect, but we should understand that we are doing so.

Sir JOHN THOMPSON.—In that respect it was intended to make the law perfectly clear. The effect is exactly the same as that of our section in the Revised Statutes. The question always arose, under indictment at common law, as to whether testimony alleged to have been false was material to the issue, and efforts were made to show it to be irrelevant and inadmissible. To prevent confusion, by allowing exceptions of that kind, it was thought desirable to settle that the reception of evidence established its materiality, as otherwise tribunals trying for perjury would have to re-try the other case practically, for the purpose of seeing whether the evidence was material or not. Section 5 of the Perjury Act in the Revised Statutes got over the difficulty in a roundabout way, by providing that every statement under oath shall be "deemed material." The present section is shorter and plainer: "Whether such evidence be material or not." I think the effect of the English Bill would have been the same, as it provides that it shall be perjury whether the evidence was admissible or not. A great many causes of confusion are eliminated from the enquiry into perjury by this definition, and the guilt of the accused is exactly the same, whether the evidence is material or not.

Mr. DAVIES (P. E. I.)—It seems to me that the English Bill merely removed from the category of doubtful points the question whether a man was a *competent* witness or not, but it did not purport to extend the crime of perjury in any sense. The latitude now allowed in cross-examination is enormous. Most counsel recognize the responsibilities of their position and do not put witnesses on the rack unnecessarily, but some are not actuated by the highest considerations, and the witness may be examined in reference to his private life or the moral character of others and in regard to matters without any relevancy to the questions at issue. It is worthy of consideration whether, if a man is asked totally immaterial questions as to his private life or his conduct many years before, he should be put on the same status in regard to his answers, if he makes untrue answers, as if he were replying to questions affecting the issue before the Court.

Mr. MILLS (Bothwell).—According to the common law rule, one who had not been a proper witness would not have been responsible for perjury on account of anything he testified. The English Bill proposed that he should be made responsible for his testimony as far as his testimony was material to the issue, just as if he had been a proper and pertinent witness.

Sir JOHN THOMPSON.—I was not undertaking to discuss critically the wording of the English Bill, which has not become law, but my impression is that it goes further than my hon. friends think. As to the latitude of cross-examination, it has practically no limit so far as it tests the credibility of the witness who is testifying, and, if a witness is examined in reference to matters immaterial to the issue but which are material to his own credibility, it should be left to the Court to punish him for perjury if he makes a false statement. The decision depends, in ninety-nine cases out of a hundred, upon the credibility of the witnesses, and very often the Court is misled by the evidence given, and it has been very difficult to arrive at what was the distinction at common law between what testimony was relevant or material and what was not.

Mr. MASSON.—Under our late statute, it was no longer necessary to prove that the statement alleged to be false, was material. That, I think, is just as far as the words of the statute can reasonably be interpreted. I agree with the Minister of Justice that if a statement is made on cross-examination that affects the credibility of the witness, it is just as important that what he says affecting his own credibility, and that gives weight to his evidence, should be true, as that the material facts referring to the issue shoud be true.

Mr. DAVIES (P. E. I.)—The 5th section of the Act 32 and 33 Victoria says." All evidence and proof whatsoever, whether given or made orally or by or in any affidavit, declaration or examination shall be deemed or taken to be material." The Hon. Gentleman says that every statement a man makes upon oath should be subject to the same penalties, whether the statement has reference to the material issue before the Court or not. Now supposing a man is called to give evidence on a question of fact and the lawyer cross-examining

him, goes into his private life, and asks questions that no witness should be liable to be asked ; some notable cases have occurred in England where questions affecting not only the character of the witness but of third parties, have been asked, cruel and brutal questions. I am not so sure that this Parliament is legislating correctly, when we put an answer to an impertinent question of that kind on the same footing as an answer which a man ought to make in Justice and in law, truly on his oath.

Mr. MASSON.—I agree that they should not be dealt with in the same manner.

Mr. DAVIES (P. E. I.)—They are by this Bill.

Mr. MASSON.— They are put in the same category ; but the heinousness of the offence is greatly different, it is in the same class of crimes. What impressed me was, that a witness, speaking inadvertently, under surprise, might make mistatements that would subject him to a prosecution for perjury, when, in fact, the man may never have intended to make a false statement. Of course, the intent would be a matter for the Jury to consider, and it might be a very difficult matter for them to consider. As to the example cited by the Hon. Member for Prince Edward Island where a person is asked as to his own character, I do not consider that a serious objection, because if his own character is open to suspicion, it is right that the Court should know it.

Sir JOHN THOMPSON.—I contend with the greatest confidence that the meaning of the section is exactly the meaning of the clause in the Revised Statutes. It is always a question of law as to whether a statement is material or not, presuming of course that the facts are not disputed. When Parliament says that evidence shall be *deemed* to be material, no witness, no Judge, no Court can deem it otherwise, no matter what evidence comes up. I think that is clear, and it has been so decided over and over again. But as regards the latitude of cross-examination I think what the hon. member for Queens. P.E.I., has said is correct. We can doubtless recall, in our experience, many cases of witnesses who have been subjected to injurious and cruel cross-examination, but we have to consider not the feelings of witnesses nor their interests,—because these must always be left to the Guardianship of the Tribunal,—but we have to consider the necessity of arriving at the ends of Justice. If a witness even in a moment of temper or anger, under provocation, under irritation—and it is a ground of reproach for any counsel thus to irritate a witness—if, even under these circumstances, he states what is false, with a deliberate intention of misleading and deceiving the Court, he ought to be amenable to the penalties for perjury.

On section 146.

Section postponed.

On section 149. (1)

(1) See Art. 151, *ante*,

Mr. DAVIES (P.E.I.)—This is a new offence altogether; I do not understand exactly what it is.

Sir JOHN THOMPSON.—It is an analogous offence to making a false statement. It is fabricating circumstances which coincide with the statement made by a witness. There is an illustration given in the report, in which a person was charged with firing a pistol with intent to kill. The defence was that the pistol was not loaded and the discharge was only intended to frighten. Evidence was given that a pistol ball had been found in a tree, in the line from the spot where the accused fired It was afterwards discovered that the ball had been placed in the tree by those interested in the prosecution, in order to supply a missing link in the evidence. In the cases of evidence regarding firearms having been recently discharged and such matters, the fabrication of evidence is not very uncommon, although grave cases, like the one mentioned in the report, are somewhat rare.

Mr. DAVIES (P.E.I.)—I fail to grasp the distinction between this new offence and subornation of perjury.

Sir JOHN THOMPSON.—There would be no subornation of perjury in a case such as quoted.

On section 150. (1)

Sir JOHN THOMPSON.—The offence mentioned in this section is one which we ought to mark with a special punishment. This kind of conspiracy is closely analogous to perjury It ought to be a special offence to enter into conspiracy to rob a man of his life and liberty. That tends to the misleading of justice, and it ought to be made punishable just as perjury is.

Mr. DICKEY.—If you conspire to make a false charge against a man that would cause him to be sentenced to death or imprisonment for life, the punishment would be imprisonment for life. In section 231 it will be found that imprisonment for conspiracy to murder as the Bill was drafted, was 10 years, and that was made 14 years in committee. It seems to me that is quite as serious an offence as the conspiracies mentioned here.

Sir JOHN THOMPSON.—A sentence of 14 years is almost equivalent to life, and I move that it be reduced to 14 years.

Amendment agreed to.

On section 151. (2)

Mr. MULOCK.—This provision, imposing a penalty on Magistrates for taking affidavits which they have no jurisdiction to take, has been very much disregarded. I think it is a law that ought not to be on the Statute-book, so far as punishment by imprisonment is concerned. Justices of the Peace are not learned in the law, and it has always been their practice to take affidavits in good faith. I think the only punishment imposed should be a pecuniary fine. After all, the affidavit would be a nullity.

(1) See Art. 152, *ante*.
(2) See Art. 153, *ante*.

Sir JOHN THOMPSON.—The policy of this section is apparent on its face namely, to prevent the taking of oaths on trifling occasions. This was greatly on the increase. Every time a man was injured or thought he was or had any complaint, he rushed off and made an affidavit; and although the Act does not prevent by any means all extra-judicial oaths, it has suppressed a vast number of them. The frequency with which statutory declarations have come into use shows that the Act has had good effect. Of course the penalty of imprisonment will not be imposed on a Magistrate who acted in good faith or even in ignorance of the law.

Mr. MULOCK.—Does the ignorance of the law excuse him ?

Sir JOHN THOMPSON.—It will save him from imprisonment. We leave that to the discretion of the Court, as we do every penalty. When we remember that the Act has been in force fifteen or sixteen years and nobody has been imprisoned improperly, we have reason to feel confidence in the exercise of discretion by the Judges. I think the fact that imprisonment may be inflicted has prevented many violations of the law by Magistrates.

Mr. MULOCK.—I move that the words "imprisonment not exceeding three months" be struck out.

Amendment negatived.

On section 154. (1)

Mr. DAVIES (P. E. I)—Why make this a criminal matter ?

Sir JOHN THOMSON.—In the public interest a private individual ought not to be allowed to discontinue a penal action, and for his own advantage enable an offender to escape. The reasoning is the same as against compounding a felony.

Mr. DAVIES (P. E. I.)—Many actions are brought under the election law in the heat of excitement, shortly after an election, for penalties, which the parties afterwards do not want to go on with and which is not desirable, in the public interests, should be gone on with.

Mr. MASSON.—I think the provision that they may be settled with the consent of the Court is quite sufficient to meet that case.

Sir JOHN THOMPSON. The clause is taken from the law of the Province of Quebec, and I should like to hear, from the gentlemen from that province what their views are about it.

Mr. LAURIER.—I share altogether the views expressed by my hon. friend beside me (Mr. Davies, P.E.I.) and I might call attention to a class of penalties in our province, which are always very odious. For instance, there is a provision, that if partnerships are not registered within a certain time, a penalty of $200 is thereby incurred. The Courts have taken every means to set aside and dismiss such actions. Very often these actions are taken in a fit of anger. A partnership may sue a debtor, and the debtor out of revenge may take action for the penalty of non-registration.

(1) See Art. 155, *ante*.

Mr. MASSON.—I move that all the words after "liable" be struck out. and the following inserted :—"To a fine not exceeding the penalty compounded for."

On section 160,

Mr. MILLS (Bothwell).—If there is no further crime committed than the escape, it seems to me to be a natural thing, and not a moral offence, for a man to endeavour to regain his liberty.

Sir JOHN THOMPSON.—We have a great many places of detention in Canada which are very insufficiently guarded and secured, and it is a great assistance to the officers that the prisoners can be informed that the mere fact of escaping is an offence in itself. It may be more effective as a prevention than a cure, because we are never able to get a conviction in the case of the man who does escape.

On section 171. (1)

Mr. DAVIES (P. E. I.)—We have got along very well without importing this old and crude and misunderstood law on blasphemy. There has been no instance to justify Parliament in adopting this new offence.

Sir JOHN THOMPSON.—It is an old offence, and when we are specifying offences and describing punishment for them, we must define this offence or treat it as no offence at all, which we would hardly be disposed to do.

Mr. DAVIES (P. E. I.)—We live in an age of religious liberty, and a man should be allowed a deal of latitude in expressing his opinions on this subject.

Mr. CURRAN.—Does the hon. gentleman think that any more liberal language could he used than is used in this section?

Mr. DAVIES (P. E. I.)—I would leave it as it is.

Sir JOHN THOMPSON.—We are not any more stringent in this section than the common law, and we are putting in a fair qualification about blasphemous libels, and one consistent with modern experience and modern liberty of speech. This protects from punishment any one who expresses in good faith and in decent language his arguments upon any religious subject whatever.

On section 177,

Mr. DAVIES (P. E. I.)—Is there any definition of what constitutes an indecent Act?

Sir JOHN THOMPSON.—No.

Mr. DAVIES (P. E. I.)—This section leaves a very large discretion in the hands of two Justices of the Peace. They might put a very curious construction upon the words "indecent act"

(1) See Art. 170, *ante*.

Mr. LAURIER.—What makes the objection stronger is that in the next section you make a gross act of indecency an indictable offence.

Sir JOHN THOMPSON.—You get the higher Judge for the indictable offence.

Mr. MILLS (Bothwell).—All these offences against morality have crept into the common law from the earlier ecclesiastical law, and they were rather sins than crimes, not being attacks upon property or life, or upon any other members of the community. The offences are wholly subjective, and altogether different in that respect from the other crimes embraced in the Statute-book; and it is a question whether crimes of this sort should be punished by long terms of imprisonment. I think that flogging, or something of that sort, and the discharge of the prisoner is preferable, and a far better deterrent than anything else.

Sir JOHN THOMPSON.—We only punish them as crimes where they are offensive to the people, or set a bad example As to section 178, relating to acts of gross indecency, I have no objection to reducing the term of imprisonment, considering that whipping accompanies it.

Mr. DAVIES (P. E. I.)—Why not retain the word "grossly" which is in the present law?

Section postponed.

On section 179.

Mr. DAVIES (P. E. I.)—We should take care not to err on the side of prudishness. The other day in London some one brought an action against an exhibitor for exhibiting an indecent picture. The picture was in reality a work of art, and it was only after the exhibitor brought artists to prove this, and after the public press had brought the engine of ridicule to bear upon the action, that the case was dismissed. Artists and others engaged in the study of human anatomy often have pictures in their studios which some people might think indecent.

Sir JOHN THOMPSON.—There is a great deal of force in what the hon. gentleman says, but it is difficult to be very definite in legislation of the vague character which legislation dealing with indecent offences must be. There have been many petitions laid on the table for legislation in this direction, and there can be no doubt it is needed to prevent indecent shows, and pictures, and photographs such as would not at all come within the category of works of art.

Mr. DAVIES (P. E. I.)—The language in the Bill, as originally drawn, is carefully framed and is all right. It must be a picture exposed to public view and tending to corrupt morals, but you have amended that by saying that any photographer who keeps a picture which others may choose to call an indecent picture is liable to prosecution.

Sir JOHN THOMPSON.—There are cases which are well known of photographers' establishments where immoral pictures are kept to satisfy curiosity, and the knowledge of the existence of these led the committee to propose this addition. The law is aimed against gross indecency in matters of this kind, and it is impossible to narrow the definition.

Mr. DAVIES (P. E. I.)—You have interpolated the statement that if any man takes a photograph of any picture of this kind, he is liable to the penalty and his motives are irrelevant, leaving out the provision as to its tending to corrupt morals. A photographer necessarily takes copies of pictures which in the minds of the vulgar would be considered indecent, but he may have the highest motives in doing so; they may be required for art students and may not have been at all intended to corrupt morals.

Mr. MASSON.—In the committee statements were made as to what was aimed at in reference to the photographs. It was alleged that it was becoming a very common practice by many photographers to import obscene pictures, and sell photographs of those pictures; and the intention was to stop that practice.

Mr. MILLS (Bothwell).—It will stop a good deal more than that. Would it not cover the case of photographers who are called into a surgical school where operations are being performed and photographs are taken, for the use of students, to give them some idea of the character of a disease?

Sir JOHN THOMPSON.—I think sub-section 3 covers that.

Mr. DAVIES (P.E.I.)—I think it goes so far that no nude picture could be photographed, no matter how high a work of art it may be. These pictures are in private houses everywhere, and many a man would have to remove, from his library or his drawing room, pictures which are perfectly innocent.

Sir JOHN THOMPSON.—How is the offence to be punished of photographers who take obscene and indecent photographs of pictures which persons of ordinary artistic taste would consider grossly indecent but which these photographers do not *publicly* sell but which they show and sell *privately* to persons whom they bring to their studios.

On section 180.

Mr. LAURIER.—In sub-section (*a*) the Hon. Gentleman is mixing up disloyalty with immorality.

Sir JOHN THOMPSON.—That is in the Post Office Act, chap. 35.

Mr. LAURIER.—It may be quite proper to make the sending of seditious matter an offence, but the Hon. Gentleman will see that a provision of this sort ought not to be made in this chapter dealing with offences against morality.

Sir JOHN THOMPSON.—The object was to gather into this Act the penal enactments of the statute, but I have no objection to amend this section by striking out the words "seditious" and "disloyal."

On section 184.

Mr. LAURIER.—This section is very wide. It makes it an offence for the master or other officer to seduce a female passenger, but it applies also to common seamen. An officer cannot be too severely punished for such an offence, but a common seaman cannot exercise authority in the same sense.

Mr. DAVIES (P.E.I.)—The original section was supposed to be confined to ships bringing immigrants to this country, and to apply to a class of passengers more or less in a helpless condition, many of them not being able to speak English. These immigrants are very largely under the control of Officers of the ship, and I can well understand the motives which prompted those who drafted the Immigration Act to throw very stringent restrictions around the protection of female immigrants. I think, however, it is a mistake to incorporate that provision in a general Act, and to make it a crime on board an ordinary ship, when it is not a crime when the same people are on shore.

Sir JOHN THOMPSON.—I will allow the section to stand.

On section 187.

Mr. DAVIES (P.E.I.)—I suggest that sub-section 2 be struck out. A girl at the age of sixteen is a mere child, and I do not think the brothel keeper ought to be given the chance of saying that she had reasonable cause to believe that the girl was over sixteen.

Sir JOHN THOMPSON.—I have no objection to striking out sub-section 2.

Section amended.

On section 189,

Mr. FLINT.—I do not think the punishment in this case is severe enough.

Sir JOHN THOMPSON.—Make it four years then.

Section amended.

On section 190.

Mr. DAVIES (P.E.I.)—This section is, I suppose, taken from the Indian Act?

Sir JOHN THOMPSON.—Yes.

Mr. DAVIES (P.E.I.)—So that if an Indian woman went into prostitution in one of the large cities, she would be liable under this section when a white woman would not. In the Indian Act it is intended only to apply to the Indian reservations.

Mr. MILLS (Bothwell).—As drawn, this section would apply to Indians who are enfranchised.

Sir JOHN THOMPSON.—I have no objection to say " unenfranchised."

Section amended.

On section 191.

Mr. DAVIES (P. E. I.)—A nuisance which only affects the comfort is not a criminal act; how far should you define a nuisance which you do not make a criminal offence ?

Sir JOHN THOMPSON.—That is worthy of consideration.

Mr. DAVIES (P. E. I.)—This section defines a common nuisance to be an *unlawful act* or an *omission to discharge a legal duty*, which act or omission endangers the lives, safety, health, property or comfort of the public. Many acts, which are lawful, are none the less a common nuisance. For instance, a man may plant a saw mill or an electric plant with engines in the vicinity of my house, the noise of which renders it a nuisance, but which is perfectly legal in itself. It is not an illegal act, but it is a nuisance all the same.

Sir JOHN THOMPSON.—The object is to preserve for the criminal law that class of cases the remedy for which is by indictment; but which partake, in all other respects, of a civil proceeding, and to provide that it shall be within the purview of the criminal procedure for carrying out the abatement of the mischief done to the public right. There are cases which are to be punished criminally; there are those which can be met by an action between private individuals, and there are those where the offence is against the public and which require to be proceeded with by way of indictment.

Mr. DAVIES (P.E.I.)—I do not understand why the words "property or comfort" are used in section 191, which is the defining clause, and not in section 192, which provides for the punishment of the offence.

Sir JOHN THOMPSON—That is to reach the class referred to in section 193 where the comfort of the public is affected, and which can only be reached through the criminal law procedure, and we do not want a man sent to prison for that.

Mr. MILLS (Bothwell).—It appears to me that the procedure should give way to the fact and that this, being a matter of civil right should be dropped out of the criminal law altogether, and should be left to the Provincial Legislatures to provide for. Under section 92 of the British North America Act, by which they can provide for the punishment of offences under a local statute, I think they can provide the system of procedure. The criminal procedure as well as the criminal law generally is, of course, under the control of this Parliament, but certain forms of offences,—provincial crimes as they are called in the case of Russell vs. the Queen in the judgment of the Judicial Committee,—may be dealt with by the Local Legis-

latures, and surely they may provide the procedure in such cases. Once you admit that the subject-matter is not in itself criminal, then the subject drops out of the control of this Legislature and you can properly omit it from the criminal code altogether.

Sir JOHN THOMPSON.—Does the hon. gentleman think there is no difficulty in the Local Legislature taking what is now a common law offence and providing procedure to give redress in regard to it ?

Mr. MILLS (Bothwell).—Take the case of something which interfered with the comfort of a particular family or individual and not the public at large. Anciently it was doubtless a criminal offence. Now you propose to leave that to be redressed by a civil remedy. It simply amounts to this, that it is no longer a crime. It is what the jurisprudence of the United States calls a police offence, and you can leave it to the proper police remedy. I would suggest to strike out the words " or comfort."

Mr. DAVIES (P.E.I.)—There is another state of facts which this clause affects. The construction of a wharf is in one sense an unlawful act in so far as it may interfere with navigation. Now, supposing under these two sections an individual were personally injured and he brought an indictment against the owner of the wharf, the owner would be in an awkward position. You are providing here for public injuries which affect the public generally, or a section of the public, which endanger the safety of their lives. So far so good. But when you go on to provide for indicting a man who commits a technical nuisance *which occasions injury to an individual* are you not going a little further than necessary ? Now, everybody knows how difficult it is to define whether a wharf is a nuisance or not. You have no right to build a wharf, it is only justified by the peculiar circumstances, by the greater benefit to be conferred on the public. The building of that wharf, although for the public benefit, and although it interferes with navigation in a very minor degree, still it may occasion injury to an individual. It seems to me under that definition he would have a right to an action.

Sir JOHN THOMPSON.—Would he not at common law ?

Mr. DAVIES (P.E.I.)—I do not think so. I think if it could be shown that the wharf was necessary to carry on the commerce of the country, the individual could not abate it as a nuisance.

Sir JOHN THOMPSON.—It has been decided in the Supreme Court that he could abate it.

Mr. MASSON.—Would not the effect of striking out " comfort" be to do away with the very example cited by the commissioners, say in the case of a highway ? It is only the public comfort that is interfered with by the non-repair of a highway. What remedy would you propose for that ?

Mr. LAURIER.—The municipal law would provide for that.

Mr. MASSON.—It does not at present.

Mr. LAURIER.—It does in my province.

Mr. MASSON.—If you take it out of the calendar of criminal offences entirely, then an individual especially aggrieved, instead of having to resort to proceeding by indictment, would have to take upon himself the responsibility of a personal action in which he would have to assume all the costs of such proceeding.

Mr. LAURIER.—A penal action.

Mr. MASSON.—That might be. It is only a question of remedies, and how to enforce it. I think you would strike a great blow at the public remedy if you took out the word "comfort."

M. DAVIES (P.E.I.)—Does a public indictment now lie against a corporation or person who injures the comfort of an individual, unless there is a pecuniary damage ?

Mr. MASSON.—Not the comfort of an individual, but the comfort of the public.

Mr. MILLS. (Bothwell).—The question of comfort is a question of injury.

Mr. DAVIES (P.E.I.)—I cannot understand how you could maintain any action under this section. Under the first section you define a common nuisance to be so and so. Under the second section you say *quoad* a certain character of this nuisance, you can proceed by indictment.

Sir JOHN THOMPSON.—You can proceed by indictment, but it is not a criminal offence. I will let 191 and 193 stand. (1)

On section 194.

Mr. LAURIER.—This class of offences, selling for human food articles which the seller knows to be unfit for human food, is a matter of police regulation, and should be left to the provincial authorities. There are by-laws in force in all our cities providing punishment for these very offences.

Mr. CURRAN.—Certain parts of the country may not be sufficiently advanced to have by-laws such as we have in Montreal, Quebec and elsewhere.

On section 200.

Mr. FRASER.—Why is there a distinction made between the three classes of houses ? I think it would be just as much a violation of the law to prevent an entrance into the first.

Sir JOHN THOMPSON.—I will look into that.

On section 203.

Mr. DAVIES (P. E. I.)—It seems to me this is unnecessary legislation. People can take care of themselves just as well in a railway carriage as they can in a club or private house. If a man chooses to

(1) See comments and authorities under Articles 191 and 192, at pp. 114–116, *ante*.

play for a dollar or two in a railway car, and loses it, let him lose it and have done with it.

On section 204.

Sir JOHN THOMPSON. I suppose it is my duty to call the attention of the committee to the addition of sub-section 2, which proposes a relaxation in regard to betting on the race-course of an incorporated association while a race is going on.

FRIDAY, 3 June 1892.

(*In the Committee.*)

On section 247. (1)

Mr. CHARLTON.—Is it intended to make a person liable to imprisonment for life if he removes a fence along a railway line ?

Sir JOHN THOMPSON.—If he does it with intent to injure or endanger the safety of any person travelling on the railway. The intent must be proved. These special penalties are provided in cases where detection is difficult and serious injury more likely to be inflicted. A brick thrown into the window of a railway carriage is much more likely to do serious harm than a brick thrown into the window of an ordinary carriage or at a person walking, and it is certainly much more difficult to detect the offender ; and the speed with which a railway train travels, rendering detection difficult, is a temptation to mischievous persons to throw missiles and inflict perhaps serious injury.

Mr. DICKEY.—Would the Hon. Minister see any objection to striking out the words " to injure or " and leave the offence punishable by imprisonment for life only where there is intent to endanger the safety of people on the train ? There is a great distinction between an act which will endanger the safety of the train iself and the passengers and the mere attack upon a person in a train. No doubt under the English decision in the case of Regina *vs.* Rooke reported in Foster and Findlayson, this would apply to a train standing still at a station. Thus, if after a heated political meeting or anything of that sort, a crowd follows a man, and when he is seated in the train, a stone is thrown at him, the person throwing it is liable to imprisonment for life, while if the party assaulted were standing in the station the person who threw the stone would only be liable for assault.

Sir JOHN THOMPSON.—I see much reason against making the amendment proposed. It would be entirely destructive of the usefulness of the section, as in every case it would be necessary to show the intention to derail the train, or knock a person off it, or in some other way endanger safety. Every enactment of criminal law provides a heavy punishment for that class of offence, and there is the

(1) See Art. 250, *ante.*

saving provision that one day's imprisonment shall answer the purpose of the section. No one can suppose that in the case suggested by my hon. friend the maximum would apply. I propose that we shall say, at line 32, "upon any engine, tender, carriage or truck, used *and in motion* upon any railway."

On section 275.

Sir JOHN THOMPSON.—The object of sub-section 4 is to keep the enactment within our jurisdiction. In the early words of the article we speak of marriages in any part of the world. Of course, Canada being a colony, this Parliament can only legislate for offences committed in Canada, and therefore in order to restrain the preceding words and restrict them to our own jurisdiction, we say:

"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."

In such case we make it an offence to leave Canada for the purpose of committing that offence in another part of the world, that being the full extent of our power.

Mr. FRASER.—Could a citizen of Canada visit a foreign country and go through such form of marriage and return here, and not come within the jurisdiction of Canada for the purposes of prosecution?

Sir JOHN THOMPSON.—Yes.

Mr. FRASER.—Does the Minister say that Parliament would have no power in such a case?

Sir JOHN THOMPSON.—We are following, in that respect, the decision given with respect to the jurisdiction of the Australian Parliament, that although the words used extended beyond the territorial jurisdiction of the Parliament, the Parliament had no authority and its legislation must be confined to its jurisdiction and interpreted accordingly. (1) While it is morally the same offence to commit bigamy outside our jurisdiction, all we can do is to punish any person who leaves this country for the purpose of committing it.

Mr. FRASER.—I have the idea in my mind that in England such cases have been dealt with. Would not an enactment of the English Parliament have effect here?

Sir JOHN THOMPSON.—Yes, but it has not legislated in that manner.

Mr. FRASER.—Then, practically, there would be no redress?

Sir JOHN THOMPSON.—There would be no criminal liability.

On section 278.

Sir JOHN THOMPSON.—This section was inserted the first time three years ago, when an attempt was made to put down offences

(1) See McLeod v. Atty Gen. N. S. Wales, 14 L. N. 402-405, *cit.* at pp. 211-213, *ante.*

connected with Mormonism and plural marriages, and after considering the laws of every state in the United States which attempted to deal with that question, we found that was the best way we could express it. (1)

On section 285.

Mr. DAVIN.—This section goes a great length in defining a defamatory libel. I am aware that there are decisions that would justify making "irony" or "insinuations" libellous, but I think great injustice might sometimes be done if we place in the statute this definition of libel. Suppose an ironical article, a skit we will say, is written in a newspaper, and an indictment is laid, and the Judge reads the law to the Jury and says, that is the law; then any Jury having this definition of libel placed before them would bring in a verdict against the accused, although from the point of view of practical life, the verdict would be an outrageous one, "*Grip*,"—which is a powerful and very useful element in our political and social life;—is guilty of libel within this section every week of his life.

Mr. LAURIER.—I do not think he is. *Grip* is ironical but not insulting.

Sir JOHN THOMPSON.—I think there can be no doubt that this Article is an exact rendering of the present law, and I am sure that the hon. gentleman will realize that it will not be less subject to interpretation, and less subject to proper administration in practice, than the common law is now, notwithstanding that it is embodied in a statute. All these provisions of a statute which merely state the common law are interpreted as making no new law, but as mere statements of the existing law. I think that my hon. friend is mistaken in assuming that the definition makes irony libel. It merely embodies the principle that an ironical statement may be a libel, and so it may. But in order to be so, it must be ironical matter published without legal justification or excuse, and likely to injure the reputation of a person and expose him to hatred, contempt and ridicule. If the hon. gentleman will glance at the other clauses he will find how well the statutory provisions as well as the common law protect *bonâ fide* journalism. For example, there are the various sections about fair reports, and so on, and then we come down to fair discussion under s ctions 292, 293, 294, 295 and 296. I think all these sections supply what the common law provides.

Mr. LAURIER.—I do not dispute the statement made by the Minister of Justice that this definition may be a fair exposition of what the common law is, but if you take it from the common law and incorporate it in a statute it ceases to be the common law and becomes statutory law, and is deprived of the element of elasticity which is so useful in the common law. I have already impressed the objection on the Minister that many of these definitions had better be left to the common law. In this case if you include irony as the constituent part of libel, I fear that many a man might be perhaps

(1) See comments and authorities at p. 216, *ante*

subject to prosecution who had no intention of injuring his neighbour but of simply creating a little merriment at the expense of somebody. I believe it should be left to the Jury to say whether the defendant intended to wound the feelings or simply to create a little amusement.

Mr. CHAPLEAU.—Irony is not a libel in itself, but you may commit a very serious libel by writing in an ironical way.

Sir JOHN THOMPSON.—There may be an ironical suggestion that a man has stolen a leg of a lamb. It may be irony, but if it is published with the intention of exposing him to hatred and insult it would be a libel. There is no design in the Act to so draw the mesh that it would catch our friends the journalists. Taking it altogether, I think that so far as journalism is concerned, the law of libel is practically a dead letter. These provisions are for the purpose of protecting reputations, not so much against the press, because the press has grown stronger than the law of libel, but for the purpose of protecting them against libels of other kinds.

On section 286.

Mr. DAVIN.—Is not this clause intended to meet that form of defamation in which a libeller writes a letter to the person intended to be libelled? I should think that that ought to be made libellous.

Mr. McCARTHY.—Showing it to anybody else would be libel. For instance, putting it on a post card so that others may see it would constitute publication, but putting it in a sealed envelope and sending it to a person is not publication.

Mr. LAURIER.—But showing the libel to the person himself is publication.

Mr. McCARTHY.—There must be some other person present.

Mr. WELDON.—The essence of the offence is that it is conducive to a breach of the peace, and it should be made libellous.

Mr. DICKEY.—I rather incline to the view of the hon. member for Albert (Mr. Weldon) that it should be made a libel, and I wish to draw the attention of the committee to the fact that it is a change in the common law, so that we may understand what we are doing. It has all the elements of, and should be made a libel.

On section 289.

Sir JOHN THOMPSON.—This is to protect the right of petition.

Mr. FRASER.—Suppose there was a gross libel on a member of Parliament or a Minister in the petition?

Sir JOHN THOMPSON.—There must be good faith.

Mr. FRASER.—Should any person be allowed to be a judge of good faith in publishing what is defamatory in a petition?

Sir JOHN THOMPSON.—That is sufficiently protected by the rules of all these bodies restricting the receiving of petitions within reasonable bounds. A petition will not be received if defamatory

and not in good faith, but if it be such a petition that a legislative body would receive it, and the subject would have the right to present it, it is protected.

Mr. FRASER.—The libel would still be published, and you would protect the person even if it were not received, for if it were a very libellous petition, the House would not allow it to be read, but there would be publication as certain parties would see it, yet the party making the libel would be protected by this section.

Sir JOHN THOMPSON.—No that would be a libel and punishable as such. All that would be necessary would be to allege that it was published to somebody else. As it was not received by the legislative body, no harm was done by attempting to publish it there, but if any body else saw the contents there would be publication.

Mr. FRASER.—Therefore if a petition is sent to myself containing a libel upon another member, it would not be considered a libel, and the party would be protected under this section, even though I saw it.

Sir JOHN THOMPSON.—The Hon. Gentleman himself would not be guilty of publishing the libel by presenting the petition to the House, and that is a necessary protection.

Mr. FRASER.—Would the party who put the libel in the petition be protected ?

Sir JOHN THOMPSON.—No, because it would be a question of publication ; and it merely says no one commits the offence by publishing to the Senate or the House of Commons. The same clause is in the English Bill in relation to either House of Parliament : " Defamatory matter contained in a petition to either House or published by order or under the authority of the House."

On section 294.

Mr. LAURIER.—This clause goes very far, in giving power to any party who thinks he suffers a *private* wrong to bring it before the public if he thinks he will thereby obtain a remedy which the offending party would then be disposed to give him. If a man owes a debt and is not willing to pay, the creditor may think that by adopting this means he can force payment. I do not think this should be encouraged.

Sir JOHN THOMPSON.—That is quite true as far as the *general law* of libel is concerned, but we are dealing only with the *crime* of libel. If a man neglects his private duties, such as the duty of supporting his family, and is critisised severely by the press for that, he has his civil remedy, but he cannot bring the journalist to the bar of Justice as a criminal.

Mr. LAURIER.—If a wife has a husband who will not support her, by this she can expose her domestic troubles before the public. Surely the hon. gentleman does not believe that the public morals will be advanced in that way.

Sir JOHN THOMPSON.—The hon. gentleman forgets the qualification that the person has a civil remedy and also that there is a provision :

" 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."

Mr. LAURIER.—The great objection I see is that this empowers anybody who, rightly or wrongly, has a grievance of a private nature against another to bring it before the public with impunity.

Mr. FRASER.—Will not the passage of this go far to make it impossible to succeed in the civil action?

Sir JOHN THOMPSON.—We have no jurisdiction in regard to the civil action.

Mr. FRASER.—But the very statement will have great effect with a Jury.

Sir JOHN THOMPSON.—It is the common law now.

On section 322

Mr. FLINT.—The stealing of any chattel by a tenant from a landlord should be no more serious than stealing from any other person.

Sir JOHN THOMPSON.—Make the penalty four years instead of seven.

Mr. FRASER.—By what rule do you make the stealing of $25 worth of property twice as bad as the stealing of $24 worth?

Mr MASSON.—It must be borne in mind that this is the same class of case as where the property of a person is put into possession of another for his use and to be returned. The tenant is in the same position as a trustee. He is let into possession of the landlord's property, and for that reason we have to deal with it separately. A banker, or accountant, or agent is dealt within the same way. This shows that the taking of small things must be treated differently from the taking of things of a higher value than $25.

On section 328.

Mr. MILLS (Bothwell).—It is a pretty severe punishment for some of the offences mentioned here to imprison one in the penitentiary for five years for the stealing of a newspaper.

Sir JOHN THOMPSON.—It is for stealing a newspaper from the mail, and the mails have to be kept sacred by very severe penalties.

Mr. MILLS (Bothwell).—From the mail, I suppose, means from the post office itself.

Sir JOHN THOMPSON.—Yes, everything after it once reaches the post office. These offences are very hard to detect. They are

committed very frequently by persons who occupy good positions in society, who have friends and influence, and if we allow magistrates or Judges to let them off leniently, we shall have very light sentences imposed. Although a good many of these sentences are reviewed, they are only reduced in cases where there is reason to suppose the offence is the first. But generally these offences have only been detected after a long course of crime ; and although the punishment is so severe, the unfortunate fact remains that in the penitentiaries of the country there are many persons who formerly occupied good positions in society, who were convicted of stealing from the mails.

On section 332.

Mr. DICKEY.—I would like to ask the Minister of Justice if he has considered the advisability of striking out the words, " over and above the value of the animal, as part of the punishment ? "

Sir JOHN THOMPSON.—I have not personally.

Mr. DICKEY.—I raised the question in the committee. It seems to me that the magistrate or other tribunal who tries the criminal charge is not the proper tribunal to settle the value of the animal, and it is difficult to know what effect it will have on the civil action, A man might be fined $10. and also $50 as the value of the dog stolen by him, and the owner of the dog might value it at $200 and sue for that value in a civil court. I suppose this means that the magistrate shall include the value of the animal in the fine. It seems a very unsatisfactory method of punishing.

Sir JOHN THOMPSON.—I presume there can be no doubt that this provision does not affect the civil remedy. It is altogether a fine; but the object is to have the fine something over the value of the animal, otherwise the person stealing it might make a profit by paying the fine and keeping the animal.

Mr. MILLS (Bothwell).—Suppose the magistrate were to value the animal at $20, and the owner brought a civil action and were awarded $50, would the magistrate be compelled to modify his judgment ?

Sir JOHN THOMPSON.—No, there is no review. Of course, for stealing other things the punishment is nearly always imprisonment; but we make the stealing of a dog, bird, beast or other animal punishable by a fine or a month's imprisonment, and therefore we must be careful to see that the fine is something more than the value of the thing taken ; and, generally speaking, in my experience, the magistrate applies a nominal value, which he arrives at in a very summary way in order to comply with the provision of the law.

Mr. DICKEY.—I have never had occasion to deal with this provision, but I know that in actions for malicious injury to property under the Summary Convictions Act, the valuation of the damages generally makes it very difficult to get a conviction at all.

Mr. FRASER.—And sometimes before a Superior Court there may be evidence of an article being very valuable, and it is quite fair to

make a man pay a fine, and also the value found by the Justice, when he is liable to a subsequent action at civil law, for the real value of the animal. Why not give the justice a greater margin to impose a fine without reference to the value, and leave that to be found by the civil remedy?

On section 333,

Mr. MILLS (Bothwell).—When does a person unlawfully kill a pigeon?

Sir JOHN THOMPSON.—Taking pigeons will be a theft so long as they are in a dove-cot or on their owner's land, but if they are stolen elsewhere, as, for instance, on the highway or on another person's land, they are taken under circumstances which do not amount to theft. This would not refer to pigeon shooting, because that would not be unlawful killing, as the person who gets up the match provides the pigeons and allows them to be killed.

On section 337.

Mr. MILLS (Bothwell).—I think in these sections, 335 to 337, the punishment is altogether out of proportion to the offence. I would not put in the power of a Judge, who may not have much feeling, to send a boy up for seven years for injury done to a tree in the park. In ninety-nine cases out of one hundred, punishment for three months is more likely to be effective.

Sir JOHN THOMPSON.—I have no objection to reduce that and make it five years.

Mr. MILLS (Bothwell).—That is too high.

There may be boys, who have been drinking, who will undertake to dare each other to commit depredations—pull out a shrub or something of that sort. It might never happen again; it possesses no criminal characteristics at all; yet if they fall into the hands of a severe Magistrate, you put it in his power to punish them.

Sir JOHN THOMPSON.—It is for the third offence.

Mr. MILLS (Bothwell).—The punishment in these cases is out of all proportion to the character of the offence.

On section 338.

Mr. O'BRIEN.—I think that is a very severe clause. Where I live, saw-logs are constantly drifting on the lake; no one looks after them, and yet if any one picked one of them up, though it might have been floating for three years, he would be liable to seven years in the penitentiary.

Mr. CHARLTON.—Very often on the lakes the rafts break up, and there is a class of men who pilfer the logs, and hide them in the woods or take them to saw mills, and the owners find this very hard. These logs are very valuable. A mast is sometimes worth $100 or more, and it is very difficult to guard these pieces of timber.

This is substantially the same provision that we have had, and I do not think it is too severe.

Mr. MILLS (Bothwell).—Very frequently, along the shores of Lake Erie, rafts go to pieces, and no one thinks of looking up the logs. It would not pay the proprietor to do so. If he finds that a number have gone ashore at some particular point, he may try to sell them to the farmer on whose land they have gone, but otherwise they may lie there until some fisherman is obliged to pile them up and burn them so as to clear his own front and to clear his fishing ground, because these parties would not pay him for the injury he may have sustained. It might be well to protect them for a time, but are they to be protected for four or five years on the front of a man's property, and he to be liable to the penitentiary if he logs them up and burns them out of the way?

Mr. SPEAKER.—Formerly there were a number of small mills along the Ottawa river whose owners made it a business to pick up a sufficient number of logs to supply their mills, and, if they were found in their booms, they set up the pretence that they had floated in there and had come to their possession innocently. This had become such a nuisance and prevailed to such an extent that there seemed to be no way of remedying the evil other than to make the possession of these logs punishable in this way, and, in 1875, as I think my hon. friend from Bothwell (Mr. Mills) will remember, the possession of these logs in the booms was made a criminal offence, the *onus* of proof being thrown upon the party in whose possession they were, instead of lying upon the party who owned the logs, as it did previously, as to the unlawful manner in which they had come into the possession of the party with whom they were found. While, perhaps, the penalty is a little too severe, I think there should be some penalty.

Sir JOHN THOMPSON.—Suppose we make it three years.

On section 365.

Sir RICHARD CARTWRIGHT.—The scope of this section is wide, and the temper of the Judges varies enormously in dealing with this particular class of offences. It appears to me that seven years' imprisonment is a very severe punishment to attach to the issuing of a highly-coloured prospectus, although I am very far from approving of the modes and schemes that a great many promoters have had recourse to.

Sir JOHN THOMPSON.—I have no objection to the term being reduced, if it is thought proper; but this has been the law for a good while here.

Mr. MILLS (Bothwell).—I remember the case where Sir Francis Hincks, under the same provision was convicted, but the law was felt to be too severe, and it was believed that he had not been intentionally guilty of fraudulent intent to mislead the public, and was never brought up for sentence.

Sir JOHN THOMPSON.—The conviction was quashed, on appeal.

Sir RICHARD CARTWRIGHT.—That was a very peculiar affair. I do not think the conviction was exactly quashed. I think it was rather evaded than quashed. No doubt it was felt at the time that it was a very severe punishment which was being inflicted.

Sir JOHN THOMPSON.—We will make it five years.

On section 384.

Sir JOHN THOMPSON.—I may explain that there is an Imperial statute to this effect, and a request was made by Her Majesty's Government two or three years ago that we should copy the provisions of that statute in order to prevent the secretion and stealing of Her Majesty's stores containing these marks; and that is the purpose of this and the next six sections.

Committee rose and reported progress.

FRIDAY, 10th June, 1892.

(In the Committee.)

On section 423.

Mr. DAVIES (P.E.I.)—Under sub-section (*v.*) the man who forges "any accountable receipt or acknowledgement of the deposit, receipt or delivery of money or goods," is liable to imprisonment for life, whereas for somewhat similar offences he is liable to 14 years' imprisonment or to 7 years imprisonment, although at first blush the latter offences appear to be just as deserving of great punishment.

Sir JOHN THOMPSON.—There is a theory for it all, and that is, that the heavier punishment for life shall attach specially to the forgery of those documents which are likely to be used fraudulently in commerce ; as for instance bills of lading, bills of exchange, bank bills, transfers of stocks and everything of that kind : and on that principle an *accountable receipt*, being a thing that is transferable, and likely to be transferred, has a special penalty attached to it. I think we ought either to restore the word "accountable" or else put the offence in the other list.

On section 428. (1)

Mr. MASSON.—Several members of the committee expressed strong opinions that some punishment should be provided for the sending of false telegrams, even where the intention was to alarm only. At present there seems to be no means of reaching criminally persons who do so, and if no financial injury is done there is no civil remedy.

M. DAVIES (P.E.I.)—I think the word "letter" ought to be put in there after the word "telegram."

(1) See Art. 429, *ante*.

Sir JOHN THOMPSON.—Very well; make it so.

On section 429.

Mr. DAVIES (P.E.I.)—This is a very serious section, and likely to give rise to trouble. During an experience of many years' practice at the bar I have heard hundreds of people allege that they signed documents understanding them to be different from what they turned out to be. A man comes to a lawyer's office and the lawyer reads perhaps a lengthy document to him, and he is so impatient to sign that he signs it, but he afterwards says he understood it to be different from what it really was, this is a serious section and might be the means of ruining a man.

Mr. MASSON.—The intention was to provide for cases where these fraudulent agents go to the country and induce people to sign documents which may perhaps turn out afterwards to be a promissory note or an order for goods, or something different from what the person supposed he was signing.

Sir JOHN THOMPSON.—It is a change in the law, and I am inclined to agree with the Hon. members for Queen's (Mr. Davies) and to drop the section.

Section dropped.

On section 433.

Sir JOHN THOMPSON.—Our exchequer bills are made on paper prepared expressly in England for that purpose. We do not use exchequer bills much, but we want that same protection here that they have in England.

Mr. DAVIES (P.E.I.)—Until you manufacture or use that special class of paper here, you are making this an offence by anticipation.

Sir JOHN THOMPSON.—We will let sections 433 and 434 stand.

Sections postponed.

On section 436.

Mr. DAVIES (P.E.I.)—Imprisonment for life is a very severe penalty for merely injuring a register.

Mr. MASSON.—That may be a very serious matter. There was an important case in Ontario not long ago, which hinged on the proof that a certain party was married at a certain time. The register was produced but there was an erasure in it, and it was claimed that it was the names of the parties married had been erased

Mr. DAVIES (P.E.I.)—I think it would be better to make provision for the erasure to meet such cases as the hon. gentleman has pointed out, but it seems to me the punishment for a mere injury is excessive.

Sir JOHN THOMPSON.—This is the wording of the present section and the same penalty.

Mr. MASSON.—I would suggest that the words be inserted in clause *a*: "or makes any erasure therein."

Section, as amended, agreed to.

On section 456.

Sir JOHN THOMPSON.—The authority for this section is a similar provision in the draft code of 1880, from which this was taken.

Mr. MULOCK.—The only case of the kind I can think of at present is the Tichborne case, in which the accused was sentenced to fourteen years imprisonment, and I cannot conceive of an offence of this character more serious than that was.

Sir JOHN THOMPSON.—If you think the penalty too great, I have no objection to making it fourteen years.

Section, as amended, agreed to.

On section 484.

Mr. DAVIES (P.E.I.)—This section has to be read, of course, in connection with 480, but I see this difficulty. Supposing two men have an interest in some wood, and one of them burns his share. Afterwards he has a dispute with his partner, who prosecutes him for the burning. The third paragraph of 480 says:

"Where the offence consists in an injury to anything in which the offender has an interest, the existence of such interest, if partial, shall not prevent his act being an offence."

Under this, the fact that the burning was not done with intent to defraud could not be pleaded.

Sir JOHN THOMPSON.—But you must read in connection with this the second paragraph of clause 430, which says:

"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."

On section 486,

Mr. DAVIES (P.E.I.)—Does *municipal* cover *civic*?

Sir JOHN THOMPSON.—Yes, by the definition, *municipality* includes city, town or village.

On section 491.

Mr. DAVIES (P.E.I.)—This question is whether this is sound in principle and whether you should not apply it to any carrier by land or water. For instance, if I send a quantity of goods to the Maritime Provinces by steamboat, they ought at least to be in the same position as if sent by rail. I would suggest that the section be made to cover any common carrier, railway or ship.

Sir JOHN THOMPSON.—We will insert after the word "railway" the words, "or in any warehouse, ship or vessel."

On section 504.

Mr. DAVIES (P. E. I.)—A year or two ago, I was present at a prosecution brought against a mortgagor, who after the term had expired and the mortgage had been foreclosed, and just before he was ejected, moved the building off the premises. The building constituted the chief part of the value, being worth about $2,000, while the land alone was not worth more than $1,000. The mortgagee prosecuted him under this section, but the Judge,—the late Judge Peters, who was a very eminent Judge in our part of the country,—ruled that the section did not apply, and the man got clear.

Sir JOHN THOMPSON.—I suppose because it was not a case of tenancy.

Mr. DAVIES (P. E. I.)—The Judge held that the man was not a tenant according to this section; so that according to his ruling, a man might give a mortgage on a house and premises of which the house was the chief part of the value, and just before the Jury gave a verdict against him, he might move the house off, and there would be no way of punishing him criminally.

Mr. MASSON.—Was the house attached to the soil?

Mr. DAVIES (P. E. I.)—It is hard to say when a house is attached to the soil in this country.

Mr. MASSON.—We generally have a clause in our mortgages creating the mortgagor a tenant at will in case of default.

Mr. DAVIES (P. E. I.)—We have the same, but the Judge held that that was put in merely for the purpose of the mortgage, and that the man was not a tenant in the ordinary sense. It seems to me that this clause ought to apply to mortgagors holding over after the mortgage is foreclosed.

Mr. MILLS (Bothwell).—I do not see why there should be any difference made between a mortgage which has not run out and one that has. It seems to me that the offence is the same, no matter when the building is removed.

Mr. DAVIES (P. E. I.)—Until there is default made in the principal or interest, the mortgagee has no right to enter; but after default is made he is the owner. It may take him some time to obtain possession, and in the meantime while he is getting a writ of ejectment, the mortgagor may move the building off.

Sir JOHN THOMPSON.—The mortgagee is the owner all along. He has the legal estate.

Mr. DAVIES (P. E. I.)—While he has the legal estate it is limited by the proviso that until default is made he shall not have the right of possession.

Mr. MILLS (Bothwell).—I cannot see any difference between a mortgage that has not run out and one that has; the legal estate is in the mortgagee. The question is whether the offence is serious enough to justify punishing it criminally, or whether the parties should not look for a remedy to the civil law.

Mr. MASSON.—They would have a civil remedy by an injunction, but while that is being obtained the man may move out.

Sir JOHN THOMPSON.—We might let the clause stand.
Section postponed.

On section 507.

Mr. DAVIES (P.E.I.)—I do not think this section ought to pass in its present form.

Sir JOHN THOMPSON.—It provides punishment for destroying a boundary fence.

Mr. DAVIES (P.E.I.)—In my experience, men are constantly disputing about their fences. A man says: Your fence is encroaching on me 10 feet, and he throws it off. That is a civil offence.

Sir JOHN THOMPSON.—It is only an offence under this section when he does it without colour of right. The question is whether there ought not to be a punishment for wilfully destroying the fence of another without any colour of right.

Mr. DAVIES (P.E.I.)—I do not read it in that way.

Mr. MILLS (Bothwell).—Is it contended that when a man undertakes to put up a boundary fence between his property and another, but places it not upon the line, but upon another's property, that he shall have the right to keep that fence up until by some legal proceeding it is removed? I think that would be putting the man against whom the wrong has been done to unnecessary trouble. If he undertakes to remove the fence it seems to me that he does so or ought to do so at the peril of being liable in case the fence is found upon the boundary because if it were found upon his property he ought not to be liable. If "A" erects a fence purporting to be a boundary between himself and "B," and erects it upon the property of "B," "B" ought to be at liberty to take it down without committing an offence. But if he has placed it in the proper position, and "B" tears it down, "B" commits an offence and ought to be made liable.

Sir JOHN THOMPSON.—Is not that the effect of it when you take into consideration section 480?

Mr. DAVIES (P.E.I.)—My trouble lies in the construction of section 480. If he pulls down a fence, &c., under *bonâ fide* colour of right, whether it turn out in the long run that he was justified or not, he should not be liable to criminal prosecution. I think we are all agreed on that. I think that sub-section 2 is so worded that he must have legal justification, or he is liable criminally whether he

has colour of right or not, because the word "and" is used instead of "or."

Sir JOHN THOMPSON.—If the word "or" were used he would be liable if he failed to have both. But this is an excepting section. Legal justification and colour of right must both be absent in order to make him liable.

On section 508-

Mr. DAVIES (P.E.I)—Do you mean by this to imply that a stipendiary or other magistrate has the power to award $5, *plus* the injury?

Sir JOHN THOMPSON.—Yes.

Mr. DAVIES (P.E.I.)—There is a great difference of opinion about that. When you add the fine and the amount and the man is sued again he pays the same judgment twice. Why should you limit the amount to $5 when a man destroys a tree on the street? I have known of a case where a man deliberately cut a valuable tree down where it had been planted by the city, and my recollection of the statute was that the limit was $20.

Sir JOHN THOMPSON.—The statute says $5.

Mr. DAVIES (P. E. I.)—I would like to see that put up to $25.

Sir JOHN THOMPSON.—I have no objection at all.

Committee rose and reported progress.

MONDAY, 13th June, 1892.

(*In the Committee.*)

On section 516.

Mr. DAVIES (P. E. I.)—This definition seems fair on its face, but I question whether it would not be better to leave the matter to the common law.

Sir JOHN THOMPSON.—It seems to me that so little is included in the definition that it is harmless, and it is convenient to retain it. It only defines what a conspiracy in restraint of trade is, and the next section, instead of saying that this shall not extend to trades unions, provides that the purposes of a trade union are not unlawful within the meaning of the definition.

Mr. DAVIES (P. E. I.)—I suppose the provisions of the Trades Unions Act have been incorporated into the present criminal code?

Sir JOHN THOMPSON.—Yes. (1)

On section 534.

Mr. MILLS (Bothwell).—Is this section necessary?

(1) See comments under Articles 517 and 520, at pp. 457-460, *ante*.

Sir JOHN THOMPSON.—Yes. The latest practice is to suspend the civil remedy until the criminal case is heard.

Mr. MILLS (Bothwell).—The rule is perfectly intelligible in England where the one Legislature deals with civil and criminal matters. Here, however, where the Local Legislature may deal with civil matters and the Federal Parliament with criminal matters, I think we cannot insert such a clause except it refers to civil rights arising out of Dominion legislation, such as bills of exchange, etc.

Sir JOHN THOMPSON.—I think it may require legislation by both the Federal and Provincial Legislatures. At any rate we had better pass it, and let the Local Legislatures supplement it. It will be giving our assent to such legislation.

On section 540,

Sir JOHN THOMPSON.—An attempt was made by the committee to ascertain exactly what the jurisdiction of the quarter session is and they thought it well to make it clear that that court has not and a county court judge has not jurisdiction, and therefore only Superior Court judges shall try the following offences :—Treason, sedition, libel, murder and attempt to murder, piracy, judicial corruption, official corruption, frauds on the Government, selling of offices, escapes, rescues, rape and attempt at rape, trade combinations, and conspiracies to accomplish these crimes. These offences are nearly all outside of that jurisdiction now, in some of the provinces completely so ; but the others mentioned such as selling offices, frauds on the Government, official corruption and trade combinations, we thought should be removed from that jurisdiction on principle. The sessions of the peace, although presided over by County Court judges, only had jurisdiction originally, under the Statute of Edward III, in matters relating to breaches of the peace ; but their jurisdiction gradually became enlarged by statute.

On section 544.

Mr. MILLS (Bothwell).—Is not this changing the law to some extent? We may proceed against a judge at present either by address of the two Houses of Parliament to the Governor General, or institute criminal proceedings by writ of *scire facias*. In the latter case, why should the intervention of the Attorney-General of Canada be necessary? You do not ask his intervention in ordinary criminal cases.

Sir JOHN THOMPSON.—In many of the cases we make the intervention of the Provincial Attorney-General necessary as between subject and subject ; and I think, as regards an officer of this kind, it is our duty to protect him from vindictive prosecution, and we should have something to say as to whether the prosecution shall be carried on.

On section 546.

Sir JOHN THOMPSON.—Prosecutions in England are very

often carried on vexatiously by seamen or some other irresponsible parties who thus delay the sailing of the vessels, there the consent of the Board of Trade is required. As to officers of the Minister of Marine examining into the seaworthiness of vessels, it is but fair that they should be notified before any such prosecution is taken.

On section 552.

Mr. DAVIES (P.E.I.)—I thought certain particular crimes had been selected and authority given to any one to arrest a person charged with committing any of those crimes, because of their serious character. I find however, in this section nearly every crime in the calendar inserted. Strangers under these circumstances might be very seriously injured. Perhaps the Hon. gentleman will allow the section to stand, until I have an opportunity to read the report of the Commissioners who prepared the section, and ascertain the reasons why the Commissioners recommended such a serious alteration in the existing criminal law practice.

Sir JOHN THOMPSON.—Of course I cannot refuse that request, but I may explain at the outset that we understand this to be the existing law, as to grave offences ; and inasmuch as we are abolishing the distinction between felonies and misdemeanours, we must mention all these things as to which we intend to have the characteristics of felonies as regards arrest.

Section postponed.

On section 561. (1)

Mr. MILLS (Bothwell).—My Hon. friend from Prince Edward Island suggest whether Prince Edward Island is not land beyond the seas.

Sir JOHN THOMPSON.— Our territory goes outside Prince Edward Island. All inside the Straits of Northumberland is in our jurisdiction.

Mr. MILLS (Bothwell).—In the correspondence between John Quincy Adams and the British Minister, the British Minister points out that what is within the jurisdiction is treated as a liberty and what is outside is treated as a right, and the matter of fishing in the gulf is a right and not a liberty which would make the gulf a part of the high seas.

Sir JOHN THOMPSON.—Not the Straits of Northumberland where you can shoot across and float across.

Committee rose.

FRIDAY, 24th June, 1892.

(*In the Commitee.*)

Mr. CURRAN.—I have received an intimation from a society in Montreal interested in these matters, expressing a desire to have the

(1) See Article 560, *ante*.

age in section 269 extended from fourteen to sixteen years. I now move that "*sixteen*" be inserted in place of "*fourteen*".

Mr. DAVIES (P. E.I.)—I think the society is proposing a change too radical.

Sir JOHN THOMPSON.—This is an offence for which a drastic punishment is provided, not only imprisonment for life but also flogging, and the intention of the Act is to extend this punishment to those who commit outrages on children. If you extend the age it will be impossible to say whether a man knew that the woman was sixteen years of age or not ; but he must be responsible if it is the case of a child. We had a remarkable case under consideration from Winnipeg a short time ago, in which a man was sentenced to a long term of imprisonment and to be whipped when it was proved that the girl was under fourteen, but was a notorious prostitute. If we extend the age to sixteen, we shall be punishing offences against *young women* while this clause is really intended to punish those who commit offences against *children*.

Mr. CURRAN.—Perhaps we might protect it by inserting the words "not being a prostitute."

Mr. MASSON.—At that age you cannot prove it.

Amendment negatived.

Mr. CURRAN.—I would call attention to section 187.
This society wishes to change the age from sixteen to twenty-one years. I move accordingly.

Amendment negatived.

Mr. DAVIES (P. E. I.)—Has the hon. gentleman received any representations respecting section 204, which relates to betting ? I have had some communication with the same society on that subject.

Sir JOHN THOMPSON.—If the hon. gentleman will bring the matter up this afternoon we will consider it.

On section 583.

Mr. DAVIES (P. E. I.)—A point arises under this section in the case of stipendiary Magistrates for cities. I may speak especially of offences under the Canada Temperance Act. Parties living in the city just go outside the jurisdiction, and the Magistrates have to send a warrant out to bring them in, as of course they will never attend without a warrant. Take the city of Charlottetown with about 14,000 population. A large number of people from the county of Queen's, come into the city to market, and offences are committed, and the stipendiary Magistrate has to try them. The parties, who live outside the city return home, beyond the Magistrate's jurisdiction. By this Bill a summons may be served beyond a Magistrate's jurisdiction, but they will not acknowledge the summons, and the question is whether it would not be well to let warrants run outside the cities within the province.

Sir JOHN THOMPSON.—The committee thought of it carefully, and seemed to think there was some danger of allowing a Magistrate to issue his warrant for anywhere outside of his jurisdiction. No doubt, in the class of cases the hon. member refers to it would be convenient, but, as a general rule, it would not do to let the warrant run outside the jurisdiction.

On section 629.

Mr. DAVIES (P. E. I.)—I never could understand or justify the rule prohibiting a man from pointing out a flaw in the indictment after he had pleaded. There ought to be a discretion given to the Court to permit a man to move to quash the indictment even after he has formally pleaded

Mr. McLEOD.—I do not believe a criminal should be barred from waiving any flaw after pleading.

Mr. DAVIES (P.E.I.)—His right should be dependent on the permission of the Judge, because otherwise his counsel would allow the trial to go on in the hope of securing an acquittal, and, failing that, move after trial for an arrest of Judgment, on the ground of a flaw in the indictment which he should have pleaded before the trial began.

Section amended by inserting the words: "except by leave of the Court before which the trial takes place."

On section 630.

Mr. DAVIES (P.E.I.)—There were some nice points raised in Ottawa some two months ago where the Crown had a prisoner for trial and Mr. McCarthy insisted that as there was a general gaol delivery the prisoner should be discharged. The Crown prosecutor protested vigorously that his chief witness was a detective who at that moment was absent but that he would obtain him if the trial were postponed. The Judge would not postpone the trial. I do not know whether this section was intended to extend to prosecutors, or was limited entirely to the defendants.

Sir JOHN THOMPSON.—It is not intended to affect the rights of prosecutors.

On section 642. (1)

Mr. DAVIES (P.E.I.)—At the present time I can go before a Grand Jury and prefer a bill of indictment. That right is limited by this section.

Sir JOHN THOMPSON.—There can be no bill of indictment preferred before a Grand Jury unless some one is bound over to prosecute, or the Attorney-General, or counsel by direction of the Attorney-General, or the Judge gives his approval. In all other cases you must go before a Magistrate first in order to secure an investigation.

(1) See Art. 641, *ante*.

Mr. DAVIES (P.E.I.)—The Grand Jury has the general power to enquire into all offences within the county, and make a short presentment to the Court on which the Attorney-General acts. Any one can go before them and say that such and such a crime has been committed.

Sir JOHN THOMPSON.—That is the theory; but my hon. friend will remember that by statute it is taken away in a great variety of cases, and it is taken away in all cases here unless there is an investigation before the Magistrate. This is to prevent malicious persons bringing an indictment.

Mr. DAVIES (P.E.I.)—It practically takes away the power of the Grand Jury to investigate and present to the Court.

Sir JOHN THOMPSON. Of course they have access to the Attorney General or the officer acting for him at all times.

Mr. MILLS (Bothwell).—I remember a case where a prisoner, who was to some extent insane, had his eye knocked out by the keeper, and the sheriff did not like to report against the keeper; but the matter was brought to the attention of the Court by the Grand Jury. In that case they named the party who committed the offence, but this section would prevent them naming the party.

Sir JOHN THOMPSON.—Yes, unless they have a bill of indictment; but they could very soon get one.

Mr. DAVIES (P.E.I.)—I am referring to the salutary powers the Grand Juries have hitherto possessed, with very great benefit to the public weal, and I fear very much that, by the way section 642 is worded, it will be withdrawn.

Sir JOHN THOMPSON.—It is not intended to be withdrawn. It is only intended to refer to the proceedings of the bill of indictment, and that is exactly the statute now.

Mr. LAURIER.—The contention of my hon. friend is that this section limits the jurisdiction of the Grand Jury simply to the finding of indictments and that they have no power to make any presentment except on indictments.

Mr. McLEOD.—The Judge always charges the Grand Jury that they have a right to enquire into matters in the county generally. They do not indict a man, but they present certain facts on which the Court acts. The question to my mind is, whether this clause does not take away that power.

Mr. DAVIES (P.E.I.)—I would suggest whether it would not be well to put in some proviso permitting the Grand Jury, under charge of the Judge, to exercise the duty of investigating matters within the county. There are gentlemen generally on the Grand Jury who take an interest in the public institutions, and at their inspection twice a year, any want of duty on the part of the officials or any improper treatment of the inmates, is brought under the notice of the Court by the Grand Jury with very salutary results. I am very jealous of

that jurisdiction of the Grand Jury being encroached upon or taken away.

Sir JOHN THOMPSON.—If these functions are found so salutary. I have no objection to drop the first part of section 642 altogether. (1)

On section 657.

Mr. DAVIES (P.E.I.)—I thought the hon. gentleman was going to introduce a clause in the Bill allowing a criminal to give evidence for himself.

Sir JOHN THOMPSON.—We have a separate Bill for that, because it relates not only to the Criminal Law but to all matters of evidence within our jurisdiction.

On section 660.

Mr. DAVIES (P.E.I.)—The old distinction between misdemeanour and felony being abolished, where will the prisoner sit during his trial ?

Sir JOHN THOMPSON.—That is subject to the discretion of the judge. There is no provision in the law now as to where he shall sit, but the practice is to compel a man charged with felony to sit in the dock, and when charged with misdeameanour he may sit elsewhere ; the distinction is purely arbitrary.

Mr. LAURIER.—What about bail ?

Sir JOHN THOMPSON.—When committed for trial for offences for which he is liable to a certain extent of punishment, the bail will be in the discretion of a judge.

On section 666. (2)

Mr. DAVIES (P.E.I.)—There are reasons for challenging the panel in the common law which you have not introduced here; for instance, close relations with the sheriff.

Sir JOHN THOMPSON.—The word "partiality" would cover that. It is better to say "partiality" than "relationship", because if you say "relationship" you have to go into the degrees.

Mr. LAURIER.—At the present time it seems that there is very little in the objection of relationship.

Mr. DAVIES (P.E.I.)—I have seen several panels quashed on account of the relationship of the sheriff with the prosecution.

Mr. McLEOD.—I think "partiality" would cover that.

Mr. CHOQUETTE.—I should like to be informed why French Canadians in Ontario should not have a jury composed in part of French-Canadians ?

(1) The portion thus dropped was as follows : "After the commencement of this Act, no Grand Jury shall present that any one has committed an indictable offence, except upon a bill of indictment duly sent before them."

(2) See comments and authorities at pp. 626, 627, *ante*.

Sir JOHN THOMPSON.—We formerly had that provision in all the provinces at common law, not only for the people in the localities but for foreigners coming there. Spaniards, French and all others. It was not uncommon to see a trial take place in that way. That system has, however, been abolished for a number of years. As regards the people of our own country, if there are many French-speaking inhabitants, for instance, in the locality in which a prisoner is tried, there will be, in all probability some of his fellow countrymen on the jury. There is ample provision made for the work of interpreting, and if a fair trial cannot be had, a change of venue may be secured.

Mr. CHOQUETTE.—It is not a question of fair trial. The provision with respect to German or Spaniards is correct, they being foreigners coming into the Dominion; but as regards Ontario, where there are a large number of French Canadians, I do not see why they should not possess the same right as the English-speaking people in Quebec.

Sir JOHN THOMPSON.—In the Province of Quebec the dual system prevails, and the prisoner is tried in both languages. In the other provinces the prisoner is tried in the English language, and there would be no practical utility in having a mixed jury.

On section 667.

Mr. DAVIES (P. E. I.)—In sub-section 5, you have adopted a change in practice in regard to Jurors. Heretofore, in misdemeanours, the Jury were allowed to disperse during the trial when the Court adjourned for the day and were not confined; but under this Act, you keep all Jurors empannelled, together, until the trial is over, whether for felony or misdemeanour.

SirJOHN THOMPSON.—That is not the intention; it means the *names of the men* and not the men themselves. It is just as at present, when we keep the names of the panel tied up together.

On section 671.

Mr. DAVIES (P. E. I.)—Is there any special provision taking away the right of election to be tried separately?

Sir JOHN THOMPSON.—It is in the discretion of the Court. They always endeavour to be tried separately. In defending prisoners I have tried very hard to get it done, but of late years it is never done with us. Nearly every application is refused.

On section 675, (1)

(1) The provision here discussed, as "*section* 675," appears to have been dropped from the Code. From the tenor of the discussion it was evidently a provision identical with section 525 of the English Draft Code, which section is in the following words:

"If the Court is of opinion that the accused is taken by surprise in a manner likely to be prejudicial to his defence by the production on behalf of the prosecutor of a witness who has not made any deposition, and of the intention to

Sir JOHN THOMPSON.—This is a very important change. At present after the Jury is once formed, the trial must proceed to a finish ; but this section allows the Jury to be broken up and the trial adjourned to a future day just as a civil case may be, according as Justice may seem to require. The commitee considered it very carefully, as it is highly important.

Mr. OUIMET.—I should think it very wise.

Mr. DAVIES (P. E. I.)—If the trial proceeds for a couple of days, and the prisoner finds himself in a tight place, he may make affidavits that he has been taken entirely by surprise, and the whole case goes by the board after enormous expense has been incurred, and it would have to be begun again, perhaps at a time when the Crown witnesses could not be secured. I cannot recall any case in my practice in which any injustice has resulted from the rule that, after the Jury is sworn and the case begun, it must continue to the end.

Mr. MASSON.—We know that in civil cases, even when we have pleadings prepared long before the trial, surprises often occur, and occasionally they are such that the Court will grant an adjournment after the trial has commenced. If it is necessary in civil cases, where only matters of dollars and cents are in question, how much more important is it that it should be granted in the case of criminal matters where a man's life or liberty is at stake.

Mr. DAVIES (P. E. I.)—This section does not only provide for an adjournment but for an absolute discharge of the Jury and a postponement of the trial.

Mr. MASSON.—An adjournment for two or three days might not be sufficient, and we cannot keep the Jury there for ever or cause them to return at a distant day. It is better they should be discharged and the trial commenced *de novo* than that they should be kept waiting for a long time.

Mr. TISDALE.—It strikes me the strongest argument in favour of this is our practice in criminal cases. The accused cannot get a new trial on errors of fact, and if it were not for that I should be inclined to oppose the clause, but that being so, it strikes me very favourably. I do not think we need fear to trust our Judges with the exercise of this discretion, and it will relieve the accused from the application of a very hard rule.

Sir JOHN THOMPSON.—My being candid and telling the com-

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produce whom the accused has not had sufficient notice, the Court may, on the application of the accused, adjourn the further hearing of the case, or discharge the Jury from giving a verdict, and postpone the trial.

"If the Court is of opinion that any witness who is not called for the prosecution ought to be so called, it may require the prosecutor to call him, and if the witness is not in attendance, make an order that his attendance shall be procured, and the Court may if it thinks proper adjourn the further hearing of the case to some other time during the sittings until such witness attends.

"If in such a case the Court is of opinion that it would be conducive to the ends of Justice to do so, it may upon the application of the accused discharge the Jury and postpone the trial."

mittee my views, will not prejudice anybody against the clause, considering the fair way in which the provisions have been received throughout; and I hope I will not be suspected of not having done my duty to the joint committee when I state I have some doubts about the clause. My experience is that the prisoner always makes a desperate effort to get a postponement, if he finds an unfavourable Jury or the evidence against him stronger than he expected. I am afraid this would tend to break up the trial in every case in which the prisoner feels he is getting the worst of it, and in that way might lead to considerable abuse. Considering the many avenues of escape we leave open to the prisoner, and the difficulty of securing conviction, I feel a little doubt about so radical a change. Its strength lies in theory, and in the fact likewise that it has been recommended in the English draft Bill.

Mr. CHAPLEAU.—I must say that my experience of 14 or 15 years in criminal trials leads me to consider this clause as objectionable; as it would lead to endless difficulties and tend, in many cases, to defeat the ends of justice. The prisoners, and especially their lawyers, are very ingenious in finding means to postpone the trial. When a case is fixed for trial, the prisoner has had all the opportunities, under our very liberal system of criminal law, for finding out what the case really is, and what witnesses are called and to be called. If we are able to boast of the administration of criminal justice in our country, it is because trials are carried on not only with liberality, but with firmness and celerity, and there is no avenue open to the undue protraction of trials.

Mr. OUIMET.—This section provides for two cases; the first one is when a witness is produced by the Crown who has not been heard in the preliminary investigation; the second clause applies to the case of a witness who has been examined in the preliminary investigation, but who does not turn up or is not called by the Crown at the trial. No doubt, in respect to the first category, injustice might occur in very extreme cases, but still we have a right to suppose that the Crown would not do anything of that kind when they knew the accused to be taken by surprise in producing a new witness of whom the accused has never heard before. As to the second clause, there is certainly no reason at all why it should remain. In the case of a witness who has been heard, but is not to be found, the law provides that his deposition may be read in Court; and, as the accused had had an opportunity in the preliminary investigation to cross-examine him, he can complain of no injustice in not having a second chance to cross-examine him. As to the first class of cases, I would frame the section so as to make it appear that in the intention of the Legislature the clause would only apply to such cases as when the Judge himself would see that a glaring injustice would result from the fact that a witness had been suddenly called up, of whom the accused knew nothing.

Mr. McLEOD.—A case might arise where a witness is produced by the prosecution without any previous notice, and the defence so taken by surprise be utterly unable at the moment, to meet his

evidence or to prepare an answer to it, although if time were given he could, and the accused would thus be very much prejudiced. I take it the intention is that if a witness were produced suddenly at the trial whose evidence was of an important nature, the Judge himself would see that unless the prisoner had an opportunity to answer the evidence so given in some way, it would be very injurious to him. In such a case it is open to question whether the Judge should discharge the Jury or simply postpone further hearing of the case. As to the second clause I do not see any strong reason for it. The Crown, I think, ought to call the witnesses whose names are on the back of the indictment, and this is now the practice.

Mr. CHAPLEAU.—Sometimes a new witness is called up through the deposition of another witness whose name is on the back of an indictment, and the prosecutor, in calling up this new witness, might be said to take the defence by surprise. In this case one of two things is always open to the Judge. He might say that he could not accept that evidence, or he might say : We have no objection to granting a brief adjournment. But a difficulty might arise for the Judge in a case where a man of means or high position finds that he has not a "friendly jury," finds that he is in a tight place, and with the great means at his command he may be able to produce witnesses who will give affidavits, and the Judge will either have to say that in his opinion those witnesses should be heard, and discharge the Jury, or adjourn the case until the next term, or else run the risk of being accused of doing an injustice to the prisoner.

Mr. MASSON.—I think the argument presented by the Minister of Customs, instead of weakening my view, strengthens it. I do not think that any difficulty will arise in the application of this provision. The Crown must either produce a witness they did not produce before, and the defence must be taken by surprise, or the Crown must have failed to call a witness as to whose testimony they had given notice and whose name they had placed on the indictment. In either of these two cases the accused may be taken at a great disadvantage. In a case of murder in which I acted for the accused, an investigation was held before a Coroner and before a bench of Magistrates. Before the Coroner a woman was called and gave evidence, in the course of which she stated that she knew nothing about the matter. This woman was not called before the Magistrates. In the meantime the detectives came into the case, and, by the means detectives use, they learned something, and she subsequently came forward and gave the convicting evidence. There is a case in which the defence was taken by surprise. Our information was that she knew nothing about the case, and would not be a witness. The first intimation we received was the appearance of her name on the back of the indictment, but as to what she was to say we knew nothing ; and without her evidence I doubt whether the party would have been convicted. There are many such cases, especially where detectives have been called in to work up the evidence. Their aim is to keep all the evidence they have obtained, and one of their methods of action is to have false statements of the evidence about to be given

published in the press. Thus the prisoner comes to trial entirely in the dark as to the network of evidence which has been woven around him. The only answer would be to suppose that all this evidence was undoubtedly true. From my experience of the evidence worked up by detectives, I am not prepared to say that all of it is undoubtedly true, and I hold that a prisoner should have an opportunity of rebutting it. It is impossible to be prepared to rebut it until the evidence is known, and when such cases arise it is only justice to say that a man on trial for his liberty or his life should be given the opportunity and time to meet it. I think we can safely trust that discretionary power in the hands of the Judges without doing violence to the administration of justice.

Mr. LAURIER.—The amendment in this case is one based more on suppositions than on real facts. The hon. gentleman who has just spoken has cited one fact from his practice, but even that solitary case is not very conclusive. The hon. gentleman stated, and it was the only argument I have heard in favour of the amendment, that it is the practice in civil cases. But there is a wide difference between civil and criminal cases. The hon. gentleman must be aware from his experience at the bar, that when a man is put on trial it is ordinarily the event of his life. He has prepared for it during days and weeks, and when the trial occurs he is fully prepared, to make his defence. If he is not fully prepared, the invariable tactics pursued are to appeal to the court for a further postponement of the trial. When at length the trial is fixed he is ready to meet it with all the means available. The argument of the Minister of Customs is unanswerable, that if this amendment is adopted it must inevitably lead to numerous miscarriages of justice.

Mr. MASSON.—The hon. gentleman has truly said that it is usually the event of a man's life to be put on trial. But he cannot possibly prepare to meet evidence of which he has had no notice, and evidence entirely different from that which he was called upon to meet before the investigating magistrate.

Mr. TISDALE.—I confess that, looking at the carefully prepared clause, it seems to me that what the English Commissioners wish to provide against, is not so much the taking advantage of a prisoner who has had every chance to be prepared, but against the Crown taking advantage of an ordinary prisoner. The prisoner must satisfy the Court that the Crown have been guilty of unfairness, and the Court must judge of that fairness. The prisoner must either show that the Crown had neglected to call a witness that, under all the fair circumstances of a criminal trial under British practice they should have called, or that they produced a witness which they should not have produced. It is limited to these two things. Those Hon. Gentlemen who have prosecuted a good deal must not forget, although they sometimes do, that a man is innocent until he is proved guilty, and that he should have the fairest possible trial in the world. I have seen eminent American lawyers of large experience in criminal cases, who, when they visited the Courts in England and saw great criminal trials conducted there, expressed them-

selves as lost in admiration at the fairness of these trials. While we are proud of our Courts in Canda, yet we have not the experience or the opportunity, and I am glad to say not the quantity of crime—because our population is smaller, perhaps—to investigate as have these eminent jurist in England. When these great criminal lawyers and jurist of Great Britain lay down such a principle, they must have had very strong reasons for it. I will most certainly support keeping this in the Bill. Though I have nothing like the experience these English lawyers have, yet I have acted sometimes as prosecutor and sometimes as defending counsel, and I lean to the old principle that a prisoner who is on trial for his life or his reputation, shall have the best of it if possible, if there is any question which side shall have the best of it.

Mr. DAVIES (P. E. I.)—I think the hon. gentleman did not do justice to the argument presented by the Minister of Customs which seemed to me to be a very strong one. Here is a Judge sitting on the bench and a man whose life is at stake is being tried. The man has had a fair Jury empannelled, and he did not object at first, but as the trial goes on he sees he has very little chance of success; and suppose he submits his own affidavit, or the affidavit of his attorney that he is taken by surprise, the Judge has only to decide on that. In civil cases the Judge may say: You can make an application for a new trial if you do not get justice, but in that criminal case no new trial can be had, and the onus is thrown on the Judge to say he does not believe the affidavit.

Mr. McLEOD.—It does not strike me that the affidavit has anything to do with it. The Act says "if the Court is of opinion," &c. The Judge hears the evidence that is given by the witness, and he simply forms his opinion from that. It does not necessarily place the Judge in any more difficult position than that in which he is placed continually in criminal trials. He takes the responsibility of that and there is no appeal from his decision. These are responsibilities attached to the office of Judge, and this is merely giving him larger jurisdiction to protect the prisoner. A Judge may see that the accused is being very injuriously prejudiced by the production of a witness of which he knew nothing, and yet he sits there powerless, and must let the prisoner suffer in consequence of that. This section puts the Judge in a position to protect the prisoner. Even if it does place the Judge in a worse position than he is in at present, then I submit that it is the duty of the Judge to take that responsibility. We should not legislate in such a way as to relieve a Judge from responsibility, but we should see that the prisoner has a fair and proper trial I am strongly impressed in favour of the section because it has been enunciated by distinguished English lawyers.

Mr. OUIMET.—This would happen in almost every case. For the preliminary examination it is only necessary that there should be one or two witnesses examined to make out a *primâ facie* case, sufficient to justify the Magistrate in committing. Then, when the trial comes on and the accused produces his witnesses, sometimes a large number of new witnesses who were not heard in the preliminary

investigation, are called. That is the reason why the general practice has been to put on the back of the indictment the name of every witness who has to be heard during the trial. If this clause is adopted in its present form, there will not be one case in a dozen in which the accused will not be in a position to produce an affidavit stating that he was taken by surprise, because he did not know in advance what would be said by every witness to be called in the case. If there is any reason for this clause, it is only in the first case mentioned, that is, when a new witness is sprung upon the defence without notice; but the placing of the name of the witness on the back of the indictment is, I think, a sufficient notice in every case. If a glaring injustice were to result from that, that would be one of those extreme cases for which we could provide; but the second part of the clause is entirely useless, and would just lead to endless litigation and practical miscarriage of justice in five out of six cases.

Mr. MASSON.—I still submit that the possibility of the Crown being prejudiced at the trial could easily be provided against by the Crown giving 24 or 48 hours' notice of the evidence they intended to produce. They do not need to give it in detail, but such as is given in a statement of particulars in a civil case. Then the prisoner would consider before the trial began whether he would make his application then or whether he would wait: and if he did not make it before the trial, having had such notice, the judge would refuse his application if made after the trial began.

Mr. OUIMET.—In trials of professional thieves, for instance, you would never get a conviction if the accused had in advance the name of every witness, and the substance of what he was going to say.

Mr. LAURIER.—We have been in the habit so far of following British legislation in criminal matters; but in this case we would be anticipating British legislation. It is true, we have the report of the British Law Commissioners, which is a very high authority, but it is not law, and it is the experience of every one, except, perhaps, my hon. friend from Grey, (Mr. Masson), that no substantial injustice has occurred. It seems to me that is a good argument why we should wait until the practice is changed in England before we change it in Canada.

Mr. MILLS (Bothwell).—I suppose this provision has been suggested by some of those cases in England in which innocent persons were convicted upon the evidence of persons who formed conspiracies against them, and were subjected to very serious punishment,—I think in one case to transportation for life; and in another case a person suffered imprisonment for 20 years before he obtained evidence to prove his innocence, and Parliament had to compensate him for the loss he sustained. It seems to me that the only effect of this provision would be to compel the prosecuting counsel to inform the defendant in a larger degree than at the present time what he intends to establish, in order to avoid the very thing that this clause if carried, authorizes the postponement of the trial. If that were

the effect, the trial on the whole would be a fairer trial than it would be if the law is left as it is. I do not know that in many cases such serious hardship arises under the present law, because by appeal to the Executive, redress can be obtained ; but that appeal after all converts the Executive into a Court in which the decisions of the Courts are reviewed and new evidence taken. The Home Secretary is doing that every day. There are two circumstances which contribute to it—the taking of the prisoner by surprise at the trial, and the question arising as to his mental soundness. In these two classes of cases appeals to the Secretary of the Home Department are rendered necessary ; and I suppose the object of this provision is largely to take from the Executive Department of the Government this duty, and vest it in the courts, where, after all, it more properly belongs.

Committee rose and reported progress.

MONDAY, 27th June 1892.

(*In the Committee.*)

On section 687, sub-section 2.

"Provided that if a witness whose deposition has been taken and signed in the manner aforesaid is absent from the province, and it is made to appear that his attendance at the trial cannot be had, the Court may, in its discretion, allow such deposition to be likewise read as evidence for the prosecution."

Mr. MULOCK.—There is a good deal of objection to this clause. The examination at the preliminary investigation is not as thorough as that at the trial.

Sir JOHN THOMPSON.—The ground on which the joint committee recommended it, was, that it was, after all, leaving the matter to the discretion of the Judge as to whether he would receive it or not. If it appeared that the witness had not been cross-examined or the prisoner not defended, and so forth, the Judge would practically refuse to admit it.

Mr. MULOCK.—I would leave discretion to the Judge, if there has been cross-examination, but not otherwise. As a matter of principle, we should not admit the doctrine that depositions should be admissible as evidence in the absence of the witness, where he has not been cross-examined.

Sir JOHN THOMPSON.—I will not press the clause. I think it is highly doubtful.

Dropped.

On section 727.

Mr. MULOCK.—That does not meet the whole case. It admits that interference with the Jury may produce substantial injury, but there shall be no relief unless discovery takes place before the verdict.

If there has been an improper interference with the Jury, it ought to be open to the prisoner to show that, even after verdict.

Sir JOHN THOMPSON.—That is so now. We endeavour to make some provision later on for a new trial in criminal cases. We will let that stand. I ask the attention of the Committee to the next section, which provides that ten men may find a verdict after four hours.

Mr. MILLS (Bothwell).—I do not like the departure from a unanimous verdict.

Sir JOHN THOMPSON.—We will let it stand for to-day, but the Committee were unanimous about it.

On section 747.

Mr. MASSON.—I ask that the grounds for a new trial be extended. At present there can be no such motion except in case where the verdict is against the weight of evidence. I think this right should also be given in case of surprise. It is rarely that a person is convicted against the weight of evidence, but there is danger that he may be convicted for lack of evidence from being taken by surprise.

Sir JOHN THOMPSON.—That would be extending the ground over a very wide area.

On section 748.

Mr. MASSON.—This section shifts the responsibility from the Court of Appeal to the Minister of Justice. The application will have to be made to the Minister, and he will take the responsibility of deciding it.

Mr. MILLS (Bothwell).—The party will have to create a doubt in the mind of the Minister of Justice as to whether the accused was properly convicted or not.

Mr. MULOCK.—If the Minister had no such discretion the prisoner would either be discharged, when perhaps he should not be discharged, or unjustly kept in prison. In cases where there is a substantial doubt, the Minister of Justice will have the matter cleared up and the doubt removed.

Mr. MILLS (Bothwell).—The question is as to which is the best place to appeal, to the Minister of Justice or to the Court.

Mr. LISTER.—This gives more power to the Minister of Justice than to the Court. If the Court should refuse to grant a new trial, on the ground that the verdict was contrary to the weight of evidence, then application could be made to the Minister of Justice, and if there was any doubt he would direct a new trial.

Sir JOHN THOMPSON.—If the Minister of Justice saw that the case was cognizable by the Court of Appeal, he would decline to exercise his power; but after the decision something may arise to throw doubts upon the conviction.

Mr. DICKEY.—The only objection I see to this section is that if we apply the term "if the Minister of Justice entertains a doubt," on a review of the evidence given, we are introducing a new term into the law. That might be understood differently by different Ministers of Justice. There are certain definite principles on which the Court of Appeal would interpret that phrase; but there is a good deal of question as to the propriety of introducing that term, so far as the Minister of Justice is concerned, unless we limit it to a doubt produced by something that has arisen subsequent to the trial. I do not think it should be a doubt arrived at by a review of the evidence given at the trial.

Mr. MILLS (Bothwell).—I have known cases to come before the Minister of Justice in which the parties were discharged without additional evidence having arisen, but in which, if such discharge had not taken place, very great wrong would have been done. In England the Home Secretary, with the aid of the Attorney General and the Solicitor General, is practically a Court of Appeal from all the courts in which the criminal law is administered. In fact, the English law as it now stands, without a proper classification of the cases of homicide, would be a very barbarous law indeed but for the powers possessed by the Home Secretary; and I think that in this country we would require to make a very great revision of our administration of the law relating to crime, were it not for the very large discretionary powers possessed by the Minister of Justice. The question is whether he ought to have another officer to assist him than the Deputy Minister of Justice.

Mr. MASSON.—I think the full powers provided by this section should certainly be in the hands of the Minister of Justice. At present he has either to grant a reduction of the sentence, a discharge of the prisoner, or a refusal; he can only take one of these three courses. This section give him another privilege, that of referring the case to a new trial, if the application is based on the ground that new facts has been discovered.

Mr. LISTER.—It is much better for the Minister of Justice, in case he thinks justice has not been done, to be in a position to direct that a new trial shall take place, than to decide that the verdict of the court was wrong. It would probably be better to have another trial, at which the accused would have an opportunity of bringing forward evidence that would satisfy the judge and jury that he was not guilty or that there was a serious doubt, than that the executive clemency should be exercised.

Mr. FRASER.—I know two or three cases in which this provision would have been of great advantage. I remember one case of a man being taken, while the Court was in session, on a charge of indecent assault, and he was tried on the following day and found guilty. There was a great deal of feeling and excitement about the case; but when the facts became known to the Minister of Justice, he saw that there was so little real evidence against the accused that he was discharged. The provision would work still better, because there

would be no appeal to the clemency of the Minister, but an opportunity for a second trial after the facts became known.

Sir JOHN THOMPSON.—We have had cases in which it would have been very desirable to have the machinery for a new trial. There was one case in Prince Edward Island of a most atrocious character, if the prisoner really committed the crime. I had no doubt in my own mind that he had, but the conclusive piece of evidence was introduced after the evidence for the defence had been given. It was no evidence in rebuttal. It was evidence as to some clothing having been found in a box in the jury room. I should have liked very much to have tried him again in order to see whether he should be executed. Here is the report which the Commissioners make on this subject:

"A much more difficult question arises in relation to cases which occur from time to time, where circumstances throwing doubt on the propriety of a conviction are discovered after the conviction has taken place. In these cases it was provided by the Bill that the Secretary of State should have power to give leave to the person convicted to apply to the Court of Appeal for a new trial. Upon the fullest consideration of the subject we do not think that such an enactment would be satisfactory. In such a case the Court of Appeal must either hear the new evidence itself or have it brought before it upon affidavit. In the former case the Court would substantially try the case upon a motion for a new trial, and this is opposed to the principle of trial by Jury. In the latter case they would have no materials for a satisfactory decision. It is impossible to form an opinion on the value of evidence given on affidavit and *ex parte*, until it has been checked and sifted by independent inquiry. Such duties could not be undertaken by a Court of Appeal. If the Secretary of State gave leave to a convict to move the Court of Appeal for a new trial on evidence brought before the Court by affidavit, the only well ascertained fact before the Court would be that the Secretary of State considered that there were grounds for such an explanation. This would make it difficult to refuse the application. The Secretary of State would be responsible only for granting leave to move the Court for a new trial. The Court, in granting a trial, would always, in fact, take into account the opinion indicated by the Secretary of State's conduct. It must also be remembered that a Court of Justice in deciding upon such applications would, in order to avoid great abuses, be obliged to bind itself by strict rules, similar to those which are enforced in applications for new trials in civil cases on the ground of newly discovered evidence. Such applications cannot be made at all after the lapse of a very short interval of time, and are not granted if the applicant has been guilty of any negligence; and this stringency is essential to the due administration of justice and to the termination of controversies. It would be unsatisfactory to apply such rules to applications for new trials in criminal cases. No matter at what distance of time the innocence of a convicted person appeared probable, no matter how grossly a man (suppose under sentence of death) had mismanaged his case, it would be impossible to refuse him a fresh investigation on the ground of such lapse of time or mismanagement. Cases in which, under some peculiar state of facts, a miscarriage of justice takes place, may sometimes though rarely occur, but when they occur, it is under circumstances for which fixed rules of procedure cannot provide.

"Experience has shown that the Secretary of State is a better judge of the existence of such circumstances than a Court of Justice can be. He has every facility for inquiring into the special circumstances; he can, and does, if necessary, avail himself of the assistance of the Judge who tried the case, and of the law officers. The position which he occupies is a guarantee of his own fitness to form an opinion. He is fettered by no rule, and his opinion does not form a precedent for subsequent cases. We do not see how a better means could be provided for enquiry into the circumstances of the exceptional cases in question. The powers of the Secretary of State, however, as to the disposing of

the cases which come before him are not as satisfactory as his power of enquiring into their circumstances. He can advise Her Majesty to remit or commute a sentence; but, to say nothing of the inconsistency of pardoning a man for an offence on the ground that he did not commit it, such a course may be unsatisfactory. The result of the enquiries of the Secretary of State may be to show, not that the convict is clearly innocent, but that the propriety of the conviction is doubtful: that matters were left out of account which ought to have been considered; or that too little importance was attached to a view of the case, the debating of which was not sufficiently apprehended at the trial. In short, the enquiry may show that the case is one on which the opinion of a second Jury ought to be given. If this is the view of the Secretary of State, he ought, we think, to have the right of asking a new trial on his own undivided responsibility.

"Such a power we accordingly propose to give him by section 545." (1)

[At one o'clock the committee adjourned, and at three o'clock resumed.]

Sir JOHN THOMPSON moved a section (752*a*.) providing that a court, in cases of extradition, may take such evidence as they may judge best to further the interests of justice.

Mr. MULOCK.—This clause is the result of the statement of a case which I made to the Minister of Justice Last summer a prisoner named Garbett was arrested, charged with an indictable offence committed in the State of Texas. He was brought before the Junior Judge of the County of York, and there were a number of people in court who were ready to prove that the prisoner was in the Town of Wingham at the time he was said to have committed the offence in the State of Texas, but the Judge held that all he had to do was to be satisfied that there was a *primâ facie* case, and he accepted the evidence of one person from Texas, who identified the accused, and upon that the order for extradition was made, although there was an army of witnesses prepared to testify that the accused was in the Province of Ontario at the time. It was endeavoured to disturb that finding but the various Judges held that they could not interfere with the ruling of the Judge, and Mr. Meyer of Wingham, who was acting for the accused, showed me the injustice of this, and I felt satisfied that there was a failure of justice and that upon the evidence of a foreigner a man (without any money in his possession) had been extradited and taken to a foreign country while all his witnesses were here. I think we should not leave the law in that state.

Sir JOHN THOMPSON.—In most of the provinces the commitment would be set aside on the ground that the evidence was not properly taken. According to the view adopted in England and in my province, the Justice in a proceeding on an indictable offence, is bound to hear the evidence for the accused.

Mr. MILLS (Bothwell).—In England there is an express statute authorizing the Magistrate to hear the evidence of the party accused; we have no such provision.

Sir JOHN THOMPSON.—There were decisions long before that law was passed.

(1) See Art. 748, p. 672, *post*.

Mr. MILLS (Bothwell).—There is now an express statute.

Committee rose and reported progress.

TUESDAY 28 June 1892.

(*In the Committee.*)

Sir JOHN THOMPSON.—I propose to amend section 2 so that the Act shall not come into force until the first day of July, 1893. instead of first of January, 1893. There was a good deal of discussion on section 6, because it undertakes to state the extent to which the criminal law of Canada is applicable, and it can only state it correctly by referring to the statutes of the United Kingdom which extend the authority of our Courts beyond our legislative jurisdiction. Although the section is instructive as it stands, and, I think, correctly states the law, yet I propose to drop it in order to avoid ambiguity.

On section 5.

Sir JOHN THOMPSON.—We had some discussion about the question of easement, and I propose to strike out this section altogether, and leave the matter as it is by common law.

On section 63,

Sir JOHN THOMPSON.—Sub-section 2 of that stood over in order that we might redraft it to make provision for the husband not being accessory to the fact, by the mere fact that he shelters his wife :

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

Sir JOHN THOMPSON.—There are various provisions as we go on for the punishment by heavy penalties, of any one who interferes with a public officer in the discharge of his duty, and the objection was made that that would include even a messenger. I propose to strike out the two last lines, of paragraph (*w*) of Article 3 thus finishing the clause with the word "Canada." (1)

On section 75.

Sir JOHN THOMPSON.—I think that is all right. There was some question as to whether holding out inducements to a man not to turn out on parade would be inducing him to desert. We have ascertained that is not the case.

(1) See Article 3 (*w*), p. 5, *ante*.

On section 110.

Sir JOHN THOMPSON.—This is worded rather ambiguously. I propose to alter that by making it read thus :

"Every one, not thereto required by his lawful trade or calling, who is found in any town or city carrying about his person any sheath knife, and so on."

On section 111.

Sir JOHN THOMPSON.—I propose to insert after the word "soldier" in the first line the words "Public Officer or Peace Officer." I want penitentiary officers to be authorized to carry arms in the discharge of their duty.

On section 122. (1)

Sir JOHN THOMPSON.—This is the one about which we had a discussion as to sedition. I think the amendment I propose will meet all views about that, I propose to strike out all the words of the section down to line 22, including the words, "Provided that" in clause 2 of sub-section (*d*) ; so that we shall make no definition of seditious intention, but will simply go on to say what shall not be seditious, leaving the definition of sedition to common law. The section will begin with : "No one shall be " on the twenty-second line.

On section 265.

Mr. MULOCK.—My hon. friend from Peel (Mr. Featherston) has received a letter from a member of the Ontario bar who gives his opinion that this section makes the punishment of a party guilty of an indictable offence, on summary conviction, liable to both a fine and imprisonment.

Sir JOHN THOMPSON.—Where a clause says that a convicted person is subject to two kinds of punishment, either kind may be inflicted, in the discretion of the Court ; as for instance, when we say that a man shall be liable to be imprisoned and to be whipped, it does not follow that he is to suffer both.

On sections 191, 192 and 193.

Mr. MILLS (Bothwell).—These were the sections that were left to be dealt with as matters of civil right.

Sir JOHN THOMPSON.—I think it is all right to pass them.

Mr. MULOCK.—Supposing there is a by-law requiring people to clean away the snow in front of their premises. By allowing the snow and ice to accumulate a person runs the risk of falling, and the owner is liable to be indicted.

Sir JOHN THOMPSON.—If it affects public safety.

Mr. MULOCK.—Any person who is a defaulter in regard to snow cleaning is subject to certain penalties under the municipal by-laws

(1) See Arts. 123 and 124, and comments at pp. 66-72, *ante*.

but we are now making the individual liable to imprisonment. I think this is going too far. The matter should be left to be enforced by municipal authorities.

Sir JOHN THOMPSON.—The mere enforcement of the by-law would not be sufficient. Any one is now indictable who leaves the sidewalk in a condition that is dangerous to the public safety. We are doing nothing more than affirming that principle. But after the word "imprisonment" we should add the words, "or a fine."

Mr. MILLS (Bothwell).—Long ago this question ceased to be dealt with by the criminal law and became a part of the police regulations. It is a question whether we should deal with it, or whether we leave it to be dealt with by the Local Legislature.

Sir JOHN THOMPSON.—The only change in recent times has been in the procedure; although they are offences against the criminal law, the procedure is that of a civil case. We should retain control of all matters connected with the life, safety and health of the people.

On section 205.

Sir JOHN THOMPSON.—I move to strike out the first two lines and substitute the following: "Every one is guilty of an indictable offenee and liable on summary conviction to two years' imprisonment and to a fine of $2,000 who." I also move the following sub-section: "Every one is guilty of an offence and liable to a penalty of $20, who buys or receives any such lot ticket or other devise as aforesaid."

On section 504.

Sir JOHN THOMPSON.—This is the section which was discussed by the hon. member for Queen's when he spoke of the mortgagor removing a house from the property.

Mr. McLEOD.—Suppose the mortgagor being in possession, proposes to effect some changes in the premises without asking the permission of the mortgagee, as is frequently done, he might come under this clause.

Mr. MULOCK.—I understand that the changes must be to the prejudice of the mortgagee.

Mr. McLEOD.—Suppose the mortgagor makes some changes in the premises, the mortgagee may say they are to his prejudice and the mortgagor will be liable to criminal prosecution.

Mr. MULOCK.—He has the protection of the Jury.

Mr. McLEOD.—He should not be liable to prosecution.

Mr. MILLS (Bothwell).—There are cases of this sort. The mortgagee cannot take possession unless the mortgagor is in default. Take the case where the mortgagor is the owner of the adjoining

property; and the principal value of the property for which he has given the mortgage is the building on it, and he removes them to property owned by himself. I have in my mind a case of that sort and it is necessary to protect against such fraud.

Mr. McLEOD.—The mortgagee is the legal owner and has the right to take possession in our law. As a matter of fact the mortgagor is left in possession and he goes on making improvements with which the mortgagee does not interfere, so long as his interest is paid.

Mr. MULOCK.—Suppose they are made for the purpose of wilfully prejudicing the interests of the owner,

Mr. McLEOD.—The difficulty is to tell whether they are or not. Take the case of a mortgagor who of his own motion and without any authority from the mortgagee did make changes. The mortgagee might say they did prejudice him. That brings him within this section, and the section should not be so drawn as to have that effect.

Mr. MILLS (Bothwell).—How is the mortgagee protected?

Mr. McLEOD.—He can take possession of the property.

Mr. MILLS (Bothwell).—I have in my mind cases where buildings were moved off the property weeks before the mortgagee knew anything about it. The mortgagee was living in another part of the country and found his property damaged to one half its value.

Mr. FLINT.—The amendment suggested is not to prevent any changes or alterations that would be deemed reasonable or prudent. They must be to the prejudice of the mortgagee.

Mr. McLEOD.—The prejudice is that it makes the property less valuable.

Sir JOHN THOMPSON.—On page 128 those five sections were allowed to stand in order that we might have a debate on trade combinations. I propose that they now pass so as to leave the law as it is.

Sections agreed to.

Sir JOHN THOMPSON.—For the purpose of providing as nearly as possible for the separate trial of children, I propose a clause which will come in conveniently as 550½. It is as follows:—

"The trials of all persons apparently under the age of 16 years shall, so far as it appears expedient and practicable, take place without publicity and separately and apart from that of other accused persons, and at suitable times to be designated and appointed for that purpose." (1)

(1) See Article 550, at p. 517, *ante*.

On section 558.

Sir JOHN THOMPSON.—I propose that this section be left as it was originally printed. The joint committee altered it, but I think they made it a little out of shape as regards the technical language.

On section 765.

Mr. OUIMET.—I suggest that the option allowed to the accused of taking a speedy trial before a Judge instead of waiting to go before a Jury, should be allowed him even during the sitting of the Court. In the City of Montreal we have four terms every year; a term always lasts more than a month, and sometimes it lasts nearly two months, so that the court is practically sitting all the time. I do not see why this option of having a speedy trial, which also amounts to having a trial before a Judge instead of before a Jury, should not be left to the accused. I propose he shall have the power to elect at any time whether the court is sitting or not, as to the tribunal before which he shall be tried.

Mr. MILLS (Bothwell).—I think there will be a great objection to introduce a system of leaving it optional to the prisoner to decide whether he shall be tried before a Jury. The only reason of the Act introduced by Mr. Sandfield Macdonald, shortly after Confederation, was to get rid of the expense of maintaining a prisoner for a long term in gaol, or keeping an innocent party who may have been accused, for a long period before his trial began; and so the trial was allowed to take place before a Judge.

Bill reported, and read the third time, and passed.

THE EXTRADITION ACT.

[R.S.C., chap. 142.]

An Act respecting the Extradition of Fugitive Criminals.

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

1. Short title.—This Act may be cited as "*The Extradition Act.*" 40 V., c. 25, s. 24.

2. Interpretation.—In this Act, unless the context otherwise requires,—

(*a.*) The expression "extradition arrangement," or "arrangement," means a treaty, convention or arrangement made by Her Majesty with a foreign state for the surrender of fugitive criminals, and which extends to Canada;

(*b.*) The expression "extradition crime" may mean any crime which, if committed in Canada, or within Canadian jurisdiction, would be one of the crimes described in the first schedule to this Act, —and, in the application of this Act to the case of any extradition arrangement, means any crime described in such arrangment whether comprised in the said schedule or not;

(*c.*) The expressions "conviction" and "convicted" do not include the case of a condemnation under foreign law by reason of contumacy; but the expression "accused person" includes a person so condemned;

(*d.*) The expressions "fugitive" and "fugitive criminal" mean a person being or suspected of being in Canada, who is accused or convicted of an extradition crime committed within the jurisdiction of any foreign state;

(*e.*) The expression "foreign state" includes every colony, dependency and constituent part of the foreign state; and every vessel of any such state shall be deemed to be within the jurisdiction of and to be part of the state;

(*f.*) The expression "warrant," in the case of a foreign state, includes any judicial document authorizing the arrest of a person accused or convicted of crime;

(*g*.) The expression "judge" includes any person authorized to act judicially in extradition matters. 40 V., c. 25, s. 1.

3. Application of Act.—In the case of any foreign state with which there is, at or after the time when this Act comes into force, an extradition arrangement, this Act shall apply during the continuance of such arrangement; but no provision of this Act, which is inconsistent with any of the terms of the arrangement, shall have effect to contravene the arrangement; and this Act shall be so read and construed as to provide for the execution of the arrangement:

2. In the case of any foreign state with respect to which the application to the United Kingdom of the Act of the Parliament of the United Kingdom, passed in the year one thousand eight hundred and seventy, and intituled "*An Act for amending the Law relating to the Extradition of Criminals*," is made subject to any limitation, condition, qualification or exception, the Governor in Council shall make the application of this Act, by virtue of this section, subject to such limitation, condition, qualification or exception:

3. The Governor in Council may, at any time, revoke or alter, subject to the restrictions of this Act, any order made by him in council under this Act, and all the provisions of this Act with respect to the original order shall, so far as applicable, apply *mutatis mutandis* to the new order. 40 V., c. 25, s. 4.

4. This Act, so far as its application in the case of any foreign state, depends on or is affected by any Order in Council made under this Act or referred to therein, shall apply, or its application shall be affected from and after the time specified in the order, or, if no time is specified, after the date of the publication of the order in the *Canada Gazette*:

2. Any order of Her Majesty in Council, referred to in this Act, and any Order of the Governor in Council made under this Act, and any extradition arrangement not already published in the *Canada Gazette*, shall be, as soon as possible, published in the *Canada Gazette* and laid before both Houses of Parliament:

3. The publication in the *Canada Gazette* of an extradiction arrangement, or an Order in Council, shall be evidence of such arrangement or order, and of the terms thereof, and of the application of this Act, pursuant and subject thereto; and the Court or Judge shall take judicial notice, without proof, of such arrangement or order, and the validity of the order and the application of this Act, pursuant and subject thereto, shall not be questioned. 40 V., c. 25, s. 5.

5. Judges and Commissioners.—All Judges of the Superior Courts and of the County Courts of any Province, and all commissioners who are, from time to time, appointed for the purpose, in any Province by the Governor in Council, under the Great Seal of Canada, by virtue of this Act are authorized to act judicially in extradition matters under this Act, within the Province: and every such person

shall, for the purposes of this Act, have all the powers and jurisdiction of any Judge or Magistrate of the Province :

2. Nothing in this section shall be construed to confer on any Judge any jurisdiction in *habeas corpus* matters. 40 V., c. 25, s. 8.

EXTRADITION FROM CANADA.

6. Issuing warrant for apprehension of fugitive.—Whenever this Act applies, a Judge may issue his warrant for the apprehension of a fugitive on a foreign warrant of arrest, or an information or complaint laid before him, and on such evidence or after such proceedings as in his opinion would, subject to the provisions of this Act, justify the issue of his warrant if the crime of which the fugitive is accused or alleged to have been convicted had been committed in Canada :

2. The Judge shall forthwith send a report of the fact of the issue of the warrant with certified copies of the evidence and foreign warrant, information or complaint, to the Minister of Justice. 40 V., c. 25, s. 11.

7. Execution of warrant.—A warrant issued under this Act may be executed in any part of Canada, in the same manner as if it had been originally issued, or subsequently endorsed, by a Justice of the Peace having jurisdiction in the place where it is executed. 40 V., c. 25, s. 10.

8. Surrender not dependent on time when offence committed.—Every fugitive criminal of a foreign state in the case of which state this Act applies, shall be liable to be apprehended, committed and surrendered in the manner provided in this Act, whether the crime or conviction in respect of which the surrender is sought was committed or took place before or after the date of the arrangement, or of the coming into force of this Act, or of the application of this Act in the case of such state, and whether there is or is not any criminal jurisdiction in any Court of Her Majesty's dominions over the fugitive in respect of the crime. 40 V., c. 25, s. 7.

9. Proceedings before the Judge.—The fugitive shall be brought before a Judge, who shall, subject to the provisions of this Act, hear the case, in the same manner, as nearly as may be, as if the fugitive was brought before a Justice of the Peace, charged with an indictable offence committed in Canada.

2. The Judge shall receive upon oath, or affirmation if affirmation is allowed by law, the evidence of any witness tendered to shew the truth of the charge or the fact of the conviction :

3. The Judge shall receive, in like manner, any evidence tendered to shew that the crime of which the fugitive is accused or alleged to have been convicted, is an offence of political character, or is, for any other reason, not an extradition crime ; or that the proceedings are being taken with a view to prosecute or punish him for an offence of a political character. 40 V., c. 25, s. 12.

10. Evidence.—Depositions or statements taken in a foreign state on oath or on affirmation, where affirmation is allowed by the law of the state, and copies of such depositions or statements, and foreign certificates of, or judicial documents stating the fact of conviction, may, if duly authenticated be received in evidence in proceedings under this Act:

2. Such papers shall be deemed duly authenticated if authenticated in manner provided, for the time being, by law, or if authenticated as follows:—

(*a.*) If the warrant purports to be signed by, or the certificate purports to be certified by, or the depositions or statements, or the copies thereof, purport to be certified to be the originals or true copies, by a Judge, Magistrate or officer of the foreign state:

(*b*) And if the papers are authenticated by the oath or affirmation of some witness, or by being sealed with the official seal of the Minister of Justice, or some other minister of the foreign state, or of a colony dependency or constituent part of the foreign state: of which seal the Judge shall take judicial notice without proof. 40 V., c. 25, s. 9.

11. Evidence necessary for committal.—If, in the case of a fugitive alleged to have been convicted of an extradition crime such evidence is produced as would, according to the law of Canada, subject to the provisions of this Act, prove that he was so convicted,—and if in the case of a fugitive accused of an extradition crime such evidence is produced as would, according to the law of Canada, subject to the provisions of this Act, justify his committal for trial, if the crime had been committed in Canada, the Judge shall issue his warrant for the committal of the fugitive to the nearest convenient prison, there to remain until surrendered to the foreign state or discharged according to law; but otherwise the Judge shall order him to be discharged; 40 V., c. 25, s. 13.

12. Proceedings on committal.—If the Judge commits a fugitive to prison he shall, on such committal—

(*a*) Inform him that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of *habeas corpus;* and—

(*b.*) Transmit to the Minister of Justice a certificate of the committal, with a copy of all the evidence taken before him, not already so transmitted, and such report on the case as he thinks fit. 40 V., c. 25, s. 14.

13. By whom requisition for surrender may be made.—A requisition for the surrender of a fugitive criminal of a foreign state who is, or is suspected to be in Canada may be made to the Minister of Justice by any person recognized by him as a consular officer of that state resident at Ottawa,—or by any minister of that state communicating with the Minister of Justice through the diplomatic representative of Her Majesty in that state,—or if neither of these modes is convenient,

then in such other mode as is settled by arrangement. 40 V., c. 25, s. 15.

14. When fugitive not liable to surrender.—No fugitive shall be liable to surrender under this Act if it appears.—

(*a.*) That the offence in respect of which proceedings are taken under this Act is one of a political character; or—

(*b.*) That such proceedings are being taken with a view to prosecute or punish him for an offence of a political character. 40 V., c. 25, s. 6.

15. Cases where surrender may be refused.—If the Minister of Justice at any time determines:—

(*a.*) That the offence in respect of which proceedings are being taken under this Act is one of a political character;

(*b.*) That the proceedings are, in fact, being taken with a view to try or punish the fugitive for an offence of a political character; or—

(*c.*) That the foreign state does not intend to make a requisition for surrender,—

He may refuse to make an order for surrender, and may, by order under his hand and seal, cancel any order made by him, or any warrant issued by a Judge under this Act, and order the fugitive to be discharged out of custody on any committal made under this Act; and the fugitive shall be discharged accordingly. 40 V., c. 25, s. 16; —45 V., c. 20, s. 1.

16. Delay before surrender.—A fugitive shall not be surrendered until after the expiration of fifteen days from the date of his committal for surrender; or if a writ of *habeas corpus* is issued, until after the decision of the Court remanding him:

2. A fugitive who has been accused of an offence within Canadian jurisdiction, not being the offence for which his surrender is asked, or who is undergoing sentence under a conviction in Canada, shall not be surrendered until after he has been discharged, whether by acquittal or by expiration of his sentence, or otherwise. 40 V., c. 25, s. 17.

17. Surrender to officer of foreign state.—Subject to the provisions of this Act, the Minister of Justice, upon the requisition of the foreign state, may, under his hand and seal, order a fugitive who has been committed for surrender to be surrendered to the person or persons who are, in his opinion, duly authorized to receive him in the name and on behalf of the foreign state, and he shall be so surrendered accordingly:

2. Any person to whom such order is directed may deliver, and the person so authorized may receive, hold in custody and convey the fugitive within the jurisdiction of the foreign state; and if he escapes out of any custody to which he is delivered, on or in pursuance of such order, he may be retaken in the same manner as any

person accused or convicted of any crime against the laws of Canada may be re-taken on an escape. 40 V., c. 25, s. 18.

18. Property found on Fugitive.—Every thing found in the possession of the fugitive at the time of his arrest, which may be material as evidence in making proof of the crime may be delivered up with the fugitive on his surrender, subject to all rights of third persons with regard thereto. 40 V., c. 25, s. 19.

19. Time within which fugitive must be conveyed out of Canada.—If a fugitive is not surrendered and conveyed out of Canada within two months after his committal for surrender, or if a writ of *habeas corpus* is issued, within two months after the decision of the Court on such writ, over and above, in either case, the time required to convey him from the prison to which he has been committed, by the readiest way out of Canada, any one or more of the Judges of the Superior Courts of the Province in which such person is confined, having power to grant a writ of *habeas corpus*, may, upon application made to him or them by or on behalf of the fugitive, and on proof that reasonable notice of the intention to make such application has been given to the Minister of Justice, order the fugitive to be discharged out of custody, unless sufficient cause is shewn against such discharge 40 V., c. 25, s. 20.

20. Forms.—The forms set fourth in the second schedule to this Act, or forms as near thereto as circumstances admit of, may be used in the matters to which such forms refer, and when used, shall be deemed valid. 40 V., c. 25, s. 21.

EXTRADITION FROM FOREIGN STATE.

21. Requisition for a fugitive from Canada.—A requisition for the surrender of a fugitive criminal from Canada, who is or is suspected to be in any foreign state with which there is an extradition arrangement, may be made by the Minister of Justice to a consular officer of that state resident at Ottawa, or to the Minister of Justice or any other Minister of that state, through the diplomatic representative of Her Majesty in that state, or if neither of these modes is convenient, then in such other mode as is settled by an arrangement. 40 V., c. 25, s. 22.

22. Conveyance of fugitive surrendered.—Any person accused or convicted of an extradition crime, who is surrended by a foreign state, may, under the warrant for his surrender issued in such foreign state, be brought into Canada and delivered to the proper authorities to be dealt with according to law.

23. Surrendered fugitive not punishable contrary to arrangement.—Whenever any person accused or convicted of an extradition crime is surrendered by a foreign state; in pursuance of any extradition arrangement, such person shall not, until after he has been restored or has had an opportunity of returning to the foreign state within

the meaning of the arrangement, be subject, in contravention of any of the terms of the arrangement, to any prosecution or punishment in Canada for any other offence committed prior to his surrender, for which he should not, under the arrangement, be prosecuted. 40 V., c. 25, s. 23.

LIST OF CRIMES.

24. Construction of list of crimes in schedule.—The list of crimes in the first schedule to this Act shall be construed according to the law existing in Canada at the date of the alleged crime, whether by common law or by statute made before or after the passing of this Act, and as including only such crimes, of the descriptions comprised in the list, as are, under that law, indictable offences. 40 V., c. 25, second schedule, *part*.

FIRST SCHEDULE.

List of Crimes.

1. MURDER, or ATTEMPT or CONSPIRACY TO MURDER ;

2. MANSLAUGHTER ;

3. COUNTERFEITING or altering money, and UTTERING counterfeit or altered money;

4. FORGERY, conterfeiting or altering, or UTTERING what is forged, counterfeited or altered;

5. LARCENY ; (1)

6. EMBEZZLEMENT; (1)

7. OBTAINING money or goods, or valuable securities, BY FALSE PRETENCES ;

8. CRIMES AGAINST BANKRUPTCY OR INSOLVENCY LAW ;

9. FRAUD by a BAILEE, BANKER, AGENT, FACTOR TRUSTEE, or by a director or member or officer of any company, which fraud is made criminal by any Act for the time being in force ; (1)

10. RAPE;

11. ABDUCTION ;

12. CHILD STEALING ;

13. KIDNAPPING ;

14. FALSE IMPRISONMENT ;

15. BURGLARY, HOUSE-BREAKING OR SHOP-BREAKING ;

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(1) See Title VI of the Code, at pp. 266 *et seq.*, for offences heretofore called larceny embezzlement, fraud, etc., and now included in the general term "THEFT".

16. ARSON ;

17. ROBBERY ;

18. THREATS, by letter or otherwise, WITH INTENT TO EXTORT ;

19. PERJURY or SUBORNATION of perjury;

20. PIRACY by municipal law or law of nations, committed on board of or against a vessel of a foreign state ;

21. CRIMINAL SCUTTLING or DESTROYING such a VESSEL AT SEA, whether on the high seas or on the great lakes of North America, or ATTEMPTING or CONSPIRING to do so ;

22. ASSAULT ON board such VESSEL AT SEA, whether on the high seas or on the great lakes of North America, with intent to destroy life or to do grievous bodily harm ;

23. REVOLT or CONSPIRACY TO REVOLT, by two or more persons on board such a vessel at sea, whether on the high seas or on the great lakes of North America, against the authority of the master ;

24. Any offence under either of the following Acts, and not included in any foregoing portion of this schedule :—

(*a*) "*An Act respecting offences against the Person;*"

(*b*) "*The Larceny Act;*" (1)

(*c*) "*An Act respecting forgery :*"

(*d*) "*An Act respecting offences relating to the Coin;*"

(*e*) "*An Act respecting Malicious Injuries to property;*"

25. Any offence which is, in the case of the principal offender, included in any foregoing portion of this schedule, and for which the fugitive criminal, though not the principal, is liable to be tried or punished as if he were the principal. 40 V., c. 25, second schedule *part.*

SECOND SCHEDULE

FORM ONE.

Form of Warrant of Apprehension.

———— ;

To wit :—

To all and each of the constables of

Whereas it has been shewn to the undersigned, a Judge under "*The Extradition Act,*" that

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(1) See Title VI of the Code at pp. 228 *et seq.*, for offences formerly termed *Larceny, Embezzlement, Fraud,* etc., and now included in the general term "THEFT."

late of is accused (*or* convicted) of the crime of within the jurisdiction of

This is therefore to command you in Her Majesty's name forthwith to apprehend the said and to bring him before me, or some other Judge under the said Act, to be further dealt with according to law; for which this shall be your warrant.

Given under my hand and seal at this day of A. D.

FORM TWO.

Form of Warrant of Committal.

——— ;

To wit :—

To one of the constables of and to the keeper of the at

Be it remembered that on this day of in the year at , is brought before me a Judge under "*The Extradition Act*," who has been apprehended under the said Act, to be dealt with according to law; and forasmuch as I have determined that he should be surrendered in pursuance of the said Act, on the ground of his being accused (*or* convicted) of the crime of within the jurisdiction of

This is therefore to command you, the said constable, in Her Majesty's name, forthwith to convey and deliver the said into the custody of the keeper of the at and you, the said keeper, to receive the said into your custody, and him there safely to keep until he is thence delivered pursuant to the provisions of the said Act, for which this shall be your warrant.

Given under my hand and seal at this day of A. D.

FORM THREE.

Form of Order of Minister of Justice for Surrender.

To the keeper of the at and to

Whereas late of accused (*or* convicted) of the crime of within the jurisdiction of was delivered into the custody of you, the keeper of the

at by warrant dated pursuant to "*The Extradition Act.*"

Now I do hereby, in pursuance of the said Act, order you, the said keeper, to deliver the said into the custody of the said ; and I command you, the said to receive the said into your custody, and to convey him within the jurisdiction of the said and there place him in the custody of any person or persons (*or* of) appointed by the said to receive him ; for which this shall be your warrant.

Given under the hand and seal of the undersigned Minister of Justice of Canada, this day of 40 V., c. 25, third schedule. A. D.

EXTRADITION BETWEEN CANADA AND THE UNITED STATES.

In an international point of view the extradition of criminals is a matter of comity, and not a matter of right, except in cases specially provided for by Treaty (1).

The first treaty between Great Britain and the United States was Jay's Treaty made in 1794. It extended only to *murder* and *felony*, and ceased its operation in 1812, at the outbreak of the American War.

The extradition of fugitive criminals between Canada and the United States is now regulated by the Ashburton Treaty or Treaty of Washington, made between Great Britain and the United States in 1842, by statutes passed to give that Treaty effect, and by a recent convention between Great Britain and the United States concluded in 1889 and ratified on the 11th March 1890. The Imperial statutes, relating to procedure in extradition generally, are the Extradition Acts, 1870, and 1873 (33-34 Vic., c. 52, and 36 & 37 Vic., c. 60), by which it is, amongst other things, enacted that if, by any law made after the passing of the Act of 1870 by the Legislature of any British possession, provision is made for carrying into effect within such possession the surrender of fugitive criminals in or suspected of being in such British possession, Her Majesty may, by any Order in Council applying the said Acts of 1870 and 1873 to any foreign state, or by any subsequent Order, suspend as to such foreign state the operation of the said Acts within any such British possession, so long as the extradition law of such British possession continues in force there; and by an Order in Council of Her Majesty, dated the 17 November 1888, it was directed that,—in view of the passing of the Act of the Dominion Parliament passed in 1886, (2) providing for carrying into effect within the Dominion of Canada, the surrender of fugitive criminals,—the operation of the Imperial Extradition Acts 1870 and 1873 should be suspended within the Dominion of Canada so long as the said Dominion statute should continue in force; and, immediately after the ratification of the convention of 1889-1890, another Imperial Order in Council was passed ordering that from and after the 4th April 1890, the Imperial Extradition Acts of 1870 and 1873 shall apply in the case of the United States and the said Convention, and further ordering that the operation of the said Imperial Acts shall be suspended

(1) Re Anderson, 11, U. C. C. P. 61, per Richards, J.; R. v. Young, 9 L. C J. 44, per Badgley, J.

(2) R.S.C. c. 142.

within the Dominion of Canada, so far as relates to the United States, and so long as the provisions of the Canadian Act of 1886 continue in force.

So, that, in Canada, our present law as to procedure in Extradition matters is contained in R.S.C. chap. 142. The Ashburton Treaty only applies to the crimes of MURDER, PIRACY, ARSON, ROBBERY, FORGERY, and the UTTERANCE OF FORGERIES; but the above mentioned Convention made between Great Britain and the United States in 1889-1890, for the extradition of fugitive criminals, embraces, as to the United States and Canada, (as a part of the British Empire), not only the offences above mentioned, but also a number of other offences, which will be found enumerated in the first of the following Articles of that Convention :—

"WHEREAS by the Xth Article of the Treaty concluded between Her Britannic Majesty and the United States of America on the ninth day of August, one thousand eight hundred and forty-two provision is made for the extradition of persons charged with certain crimes ;

"And whereas it is now desired by the High Contracting Parties that the provisions of the said Article should embrace certain crimes not therein specified, and should extend to fugitives convicted of the crimes specified in the said Article and in this Convention ;

"The said High Contracting Parties have appointed as their plenipotentiaries to conclude a Convention for this purpose, that is to say :—

"Her Majesty the Queen of the United Kingdom of Great Britain and Ireland ; Sir Julian Pauncefote, Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George, Knight Commander of the Most Honourable Order of the Bath, and Envoy Extraordinary and Minister Plenipotentiary of Her Britannic Majesty to the United States ;

"And the President of the United States of America ; James G. Blaine, Secretary of State of the United States ;

"Who, after having communicated to each other their respective full powers, found in good and due form, have agreed upon and concluded the following Articles :—

"ARTICLE I.

"The provisions of the said Xth Article are hereby made applicable to the following *additional* crimes :—

"1. MANSLAUGHTER when voluntary.

"2. COUNTERFEITING OR ALTERING money ; UTTERING OR BRINGING INTO CIRCULATION COUNTERFEIT OR ALTERED MONEY.

"3. EMBEZZLEMENT ; LARCENY ; RECEIVING any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained. (1)

(1) See Title VI of the Code at pp. 266 *et seq.*, for offences formerly called larceny, embezzlement, etc., and now included in the general term "THEFT."

"4. FRAUD by a bailee, banker, agent, factor, trustee, or director or member or officer of any company, made criminal by the laws of both countries.

"5. PERJURY, or SUBORNATION OF PERJURY.

"6. RAPE; ABDUCTION; CHILD-STEALING; KIDNAPPING.

"7. BURGLARY; HOUSEBREAKING or SHOPBREAKING.

"8. PIRACY by the law of nations.

"9. REVOLT, or CONSPIRACY TO REVOLT, by two or more persons on board a ship on the high seas, against the authority of the master; WRONGFULLY SINKING OR DESTROYING A VESSEL AT SEA, or ATTEMPTING to do so; ASSAULTS ON BOARD A SHIP on the high seas, WITH INTENT to do grievous bodily harm.

"10. CRIMES AND OFFENCES AGAINST THE LAWS of both countries for the suppression of SLAVERY and SLAVE TRADING.

"Extradition is also to take place for PARTICIPATION in any of the crimes mentioned in this Convention or in the aforesaid Xth Article, provided such participation be punishable by the laws of both countries.

"ARTICLE II.

"A fugitive criminal shall not be surrendered, if the offence in respect of which his surrender is demanded be one of a political character, or if he proves that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character.

"No person surrendered by either of the High Contracting Parties to the other shall be triable or tried, or be punished for any political crime or offence, or for any act connected therewith, committed previously to his extradition.

"If any question shall arise as to whether a case comes within the provisions of this Article, the decision of the authorities of the Government in whose jurisdiction the fugitive shall be at the time shall be final.

"ARTICLE III.

"No person surrendered by or to either of the High Contracting Parties shall be triable or be tried for any crime or offence committed prior to his extradition, other than the offence for which he was surrendered, until he shall have had an opportunity of returning to the country from which he was surrendered.

"ARTICLE IV.

"All articles seized which were in the possession of the person to be surrendered at the time of his apprehension, whether being the proceeds of the crime or offence charged, or being material as evidence in making proof of the crime or offence, shall, so far as practicable, and if the competent authority of the State applied to for

the extradition has ordered the delivery thereof, be given up when the extradition takes place. Nevertheless, the rights of third parties with regard to the articles aforesaid shall be duly respected.

"ARTICLE V.

"If the individual claimed by one of the two High Contracting Parties, in pursuance of the present Convention, should also be claimed by one or several other Powers on account of crimes or offences committed within their respective jurisdictions, this extradition shall be granted to that State whose demand is first received.

"The provisions of this Article, and also of Articles II to IV inclusive, of the present Convention, shall apply to surrender for offences specified in the aforesaid Xth Article, as well as to surrender for offences specified in this Convention.

"ARTICLE VI.

"The extradition of fugitives under the provisions of this Convention and of the said Xth Article shall be carried out in Her Majesty's dominions and in the United States, respectively, in conformity with the laws regulating extradition for the time being in force in the surrendering State.

"ARTICLE VII.

"The provisions of the said Xth Article and of the Convention shall apply to persons convicted of the crimes therein respectively named and specified, whose sentence therefor shall not have been executed.

"In case of a fugitive criminal alleged to have been convicted of the crime for which his surrender is asked, a copy of the record of the conviction and of the sentence of the Court before which such conviction took place duly authenticated shall be produced, together with the evidence proving that the prisoner is the person to whom such sentence refers.

"ARTICLE VIII.

"The present Convention shall not apply to any of the crimes herein specified which shall have been committed, or to any conviction which shall have been pronounced, prior to the date at which the Convention shall come into force."

Where a prisoner was, with a view to his extradition to Canada, arrested in New York, and charged there before a United States Commissioner with having forged in Montreal, the endorsements of certain bank drafts, it was, after his commitment for extradition, contended, upon *habeas corpus* before the United States Circuit Court that, as the proceedings before the Commissioner were not instituted by the public authorities of Canada or by any person authorised to represent the executive of the Canadian government, but merely by a private individual alleged to have been affected by the forgery charged against the prisoner, the commitment was illegal; and Brown, J.,—who rendered judgment quashing the proceedings and discharging the prisoner,—held, on the authority of a previous decision in *re* Kelly, (1) that it was the foreign government only

(1) In *re* Kelly, 26 Fed. Rep. 852—856.

that was entitled to obtain the extradition of the accused, that the initiatory steps for extradition must be by authority of the foreign government and in its behalf, that the complaint in this case, having been made by a private individual, it was necessary that he should have shewn, *before the closing of the proceedings before the Commissioner* and before the commitment, that he was a person authorised to represent and act in the matter on behalf of the executive of the foreign power, or that his proceedings had been adopted by such executive, and that, not having shewn any such authority or any such adoption by the Canadian authorities, the proceedings were illegal and must be set aside. (1)

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(1) In *re* Ferrelle, S. C., 28 Fed. Rep. 878; 9 Cr. Law Mag. 85.

THE FUGITIVE OFFENDERS' ACT.

[R.S.C., CHAP. 143.]

An Act respecting fugitive offenders in Canada from other parts of Her Majesty's Dominions.

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

1. Short Title.—This Act may be cited as "*The Fugitive Offenders, Act.*" 45 V., c. 21, s. 1.

2. Interpretation.—In this Act, unless the context otherwise requires,—

(*a.*) The expression "Magistrate" means any Justice of the Peace or any person having authority to issue a warrant for the apprehension of persons accused of offences, and to commit such persons for trial;

(*b.*) The expression "Deposition" includes every affidavit, affirmation, or statement made upon oath;

(*c.*) The expression "Court" means.—in the province of Ontario, the High Court of Justice for Ontario; in the province of Quebec, the Superior Court; in the province of Nova Scotia, the Supreme Court; in the province of New Brunswick, the Supreme Court; in the province of Prince Edward Island, the Supreme Court of Judicature; in the province of British Columbia, the Supreme Court; in the province of Manitoba, Her Majesty's Court of Queen's Bench for Manitoba; in the North-West Territories, a Judge of the Supreme Court for the North-West Territories; in the District of Keewatin, a stipendiary Magistrate; and also in the said Territories and District such Court or Magistrate or other judicial authority as is designated, from time to time, by proclamation of the Governor in Council published in the *Canada Gazette.* 45 V., c. 21, s. 16, *part*;—49 V., c. 25, s. 30.

3. Application of Act.—This Act shall apply to the following offences, that is to say: to treason and to piracy, and to every offence, whether called felony, misdemeanor, crime or by any other name, which is for the time being punishable in the part of Her

Majesty's dominions in which it was committed, either on indictment or information, by imprisonment with hard labor for a term of twelve months or more, or by any greater punishment, and, for the purposes of this section, rigorous imprisonment, and any confinement in a prison combined with labor, by whatever name it is called, shall be deemed to be imprisonment with hard labor.

2. This Act shall apply to an offence, notwithstanding that, by the law of Canada, it is not an offence or not an offence to which this Act applies; and all the provisions of this Act, including those relating to a provisional warrant and to a committal to prison, shall be construed as if the offence were in Canada an offence to which this Act applies:

3. This Act shall apply, so far as is consistent with the tenor thereof, to every person convicted by a Court in any part of Her Majesty's dominions, of an offence committed either in Her Majesty's dominions or elsewhere, who is unlawfully at large before the expiration of his sentence, in like manner as it applies to a person accused of the like offence committed in the part of Her Majesty's dominions in which such person was convicted:

4. This Act shall apply in respect to offences committed before the commencement of this Act, in like manner as if such offences were committed after such commencement. 45 V., c. 21, ss. 8, 14 and 15.

RETURN OF FUGITIVES.

4. Apprehension and return of fugitive offenders.—Whenever a person accused of having committed an offence to which this Act applies in any part of Her Majesty's dominions, except Canada, has left that part, such person, in this Act referred to as a fugitive from that part, if found in Canada, shall be liable to be apprehended and returned, in the manner provided by this Act, to the part from which he is a fugitive:

2. A fugitive may be so apprehended under an indorsed warrant or a provisional warrant. 45 V., c. 21, s. 2.

5. Proceedings in Canada on warrant issued elsewhere.—Whenever a warrant has been issued in a part of Her Majesty's dominions for the apprehension of a fugitive from that part who is, or is suspected to be in or on the way to Canada, the Governor General or a Judge of a Court, if satisfied that the warrant was issued by some person having lawful authority to issue the same, may indorse such warrant in manner provided by this Act, and the warrant so indorsed shall be a sufficient authority to apprehend the fugitive in Canada and bring him before a Magistrate. 45 V., c. 21, s. 3.

6. Provisional warrant.—A Magistrate in Canada may issue a provisional warrant for the apprehension of a fugitive who is or is

suspected of being in or on his way to Canada, on such information and under such circumstances as would, in his opinion, justify the issue of a warrant, if the offence of which the fugitive is accused had been committed within his jurisdiction; and such warrant may be backed and executed accordingly:

2. A Magistrate issuing a provisional warrant shall forthwith send a report of the issue together with the information or a certified copy thereof to the Governor General; and the Governor General may if he thinks fit discharge the person apprehended under such warrant. 45 V., c. 21, s. 4.

7. Proceedings on fugitive's apprehension.—A fugitive, when apprehended, shall be brought before a Magistrate, who, subject to the provisions of this Act, shall hear the case in the same manner, and have the same jurisdiction and powers, as nearly as may be, including the power to remand and admit to bail, as if the fugitive was charged with an offence committed within his jurisdiction;

2. If the endorsed warrant for the apprehension of the fugitive is duly authenticated, and such evidence is produced as, subject to the provisions of this Act, according to the law ordinarily administered by the Magistrate raises a strong or probable presumption that the fugitive committed the offence mentioned in the warrant, and that the offence is one to which this Act applies, the Magistrate shall commit the fugitive to prison to await his return, and shall forthwith send a certificate of the committal and such report of the case, as he thinks fit, to the Governor General.

3. Whenever the Magistrate commits the fugitive to prison he shall inform the fugitive that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of *habeas corpus* or other like process;

4. A fugitive apprehended on a provisional warrant may, from time to time, be remanded for such reasonable time not exceeding seven days at any one time as under the circumstances seems requisite for the production of an endorsed warrant. 45 V., c. 21, s. 5.

8. Order for fugitive's return.—Upon the expiration of fifteen days after the fugitive has been committed to prison to await his return,—or if a writ of *habeas corpus* or other like process is issued by a Court with reference to such fugitive, after the final decision of the Court in the case,—the Governor General, by warrant under his hand, if he thinks it just, may order the fugitive to be returned to the part of Her Majesty's dominions from which he is a fugitive, and for that purpose to be delivered into the custody of the persons to whom the warrant is addressed, or some one or more of them, and to be held in custody and conveyed to the said part of Her Majesty's dominions, to be dealt with there, in due course of law, as if he had been there apprehended; and such warrant shall be forthwith executed according to the tenor thereof. 45 V., c. 21, s. 6.

9. Discharge of fugitive in certain cases.—If a fugitive who, in pursuance of this Act, has been committed to prison in Canada to

await his return, is not conveyed out of Canada within two months after such committal, the Court, upon application, by or on behalf of the fugitive, and upon proof that reasonable notice of the intention to make such application has been given to the Governor General, may, unless sufficient cause is shown to the contrary, order the fugitive to be discharged out of custody. 45 V., c. 21, s. 7.

10. Whenever it is made to appear to the Court that by reason of the trivial nature of the case, or by reason of the application for the return of a fugitive not being made in good faith, in the interests of justice or otherwise, it would, having regard to the distance, to the facilities for communication, and to all the circumstances of the case, be unjust or oppressive or too severe a punishment to return the fugitive either at all or until the expiration of a certain period, such Court may discharge the fugitive, either absolutely or on bail, or order that he shall not be returned until after the expiration of the period named in the order, or may make such other order in the premises, as to the Court seems just. 45 V., c. 21, s. 9.

11. A fugitive undergoing sentence for another offence.—A fugitive who has been accused of an offence within Canadian jurisdiction, not being the offence for which his surrender is asked, or who is undergoing sentence under a conviction in Canada, shall not be surrendered until after he has been discharged, whether by acquittal or by expiration of his sentence, or otherwise.

12. Search warrant.—Whenever a warrant, for the apprehension of a person accused of an offence, has been endorsed in pursuance of this Act, in Canada, any magistrate in Canada shall have the same power of issuing a warrant to search for any property alleged to have been stolen or to be ortherwise unlawfully taken or obtained by such person, or otherwise to be the subject of such offence, as that magistrate wouldhave if the property had been stolen or otherwise unlawfully takenor obtained, or the offence had been committed wholly within the jurisdiction of such magistrate. 45 V., c. 21, s. 10.

13. Exercise of judicial powers.—Any judge of the court may either in term time or vacation, exercise in chambers, all the powers conferred by this Act upon the court. 45 V., c. 21, s. 16, *part.*

14. Endorsement on a warrant.—An indorsement of a warrant in pursuance of this Act shall be signed by the authority indorsing the same, and shall authorize all or any of the persons named in the indorsement, and of the persons to whom the warrant was originally directed, and also every constable, to execute the warrant within Canada by apprehending the person named in it, and bringing him before a magistrate in Canada, whether he is the magistrate named in the indorsement or some other :

2. Every warrant, summons, subpœna and process, and every indorsement made in pursuance of this Act thereon, shall, for the

purposes of this Act, remain in force, notwithstanding that the person signing the warrant or such indorsement dies or ceases to hold office. 45 V., c. 21, s. 11.

15. Manner of return of fugitive.—Whenever a fugitive or prisoner is authorized to be returned to any part of Her Majesty's dominions in pursuance of this Act, such fugitive or prisoner may be sent thither in any ship registered in Canada or belonging to the Government of Canada :

2. The Governor General, for the purpose aforesaid, may, by the warrant for the return of the fugitive, order the master of any ship registered in Canada, bound to the said part of Her Majesty's dominions, to receive such fugitive or prisoner, and afford a passage and subsistance during the voyage to him, and to the person having him in custody, and to the witnesses; but such master shall not be required to receive more than one fugitive or prisoner for every hundred tons of his ship's registered tonnage, or more than one witness for every fifty tons of such tonnage :

3. The Governor General shall cause to be endorsed upon the agreement of the ship such particulars with respect to any fugitive prisoner or witness sent in her, as the Minister of Marine and Fisheries, from time to time, requires :

4. Every such master shall, on his ship's arrival in the said part of Her Majesty's dominions, cause such fugitive or prisoner, if he is not in the custody of any person, to be given into the custody of some constable there, to be dealt with according to law :

5. Every master who fails, on payment or tender of a reasonable amount for expenses, to comply with an order made in pursuance of this section, or to cause a fugitive or prisoner committed to his charge to be given into custody as required by this section, shall be liable, on summary conviction, to a penalty not exceeding two hundred dollars. 45 V., c. 21, s. 12.

EVIDENCE.

16. Depositions.—A Magistrate may take depositions for the purposes of this Act, in the absence of a person accused of an offence, in like manner as he might take the same if such person was present and accused of the offence before him. 45 V., c. 21, s. 13, *part.*

17. Depositions whether taken in the absence of the fugitive or otherwise and copies thereof, and official certificates of, or judicial documents stating facts, may, if duly authenticated, be received in evidence in proceedings under this Act. 45 V., c 21, s. 13, *part.*

18. Authentication of Warrants, etc.—Warrants and depositions and copies thereof, and official certificates of, or judicial documents stating facts, shall be deemed duly authenticated for the purposes of this Act, if they are authenticated in manner provided, for the

time being, by law, or if they purport to be signed by or authenticated by the signature of a Judge, Magistrate or Officer of the part of Her Majesty's dominions in which the same are issued, taken or made, and are authenticated either by the oath of some witness or by being sealed with the official seal of a Secretary of State, or with the public seal of a British possession, or with the official seal of a Governor of a British possession or of a Colonial Secretary, or of some Secretary or Minister administering a department of the government of a British possession; and all Courts and Magistrates shall take judicial notice of every such seal as is in this section mentioned, and shall admit in evidence without further proof the documents authenticated by it. 45 V., c. 21, s. 13, *part*.

GENERAL INDEX.